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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 214 Term, 194—.

JACKSON & PERKINS COMPANY,
Petitioner

vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, Trading as BICKLEY'S AUTO EXPRESS,
Respondents

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, as of January Term, 1944, No. 262.

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Philadelphia 7, Pa.
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

No. Term, 194

JACKSON & PERKINS COMPANY,
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vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, trading as BICKLEY'S AUTO EXPRESS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of JACKSON AND PERKINS COMPANY respectfully shows to this Honorable Court as follows:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a Petition by Jackson and Perkins Company for a Writ of Certiorari to the Supreme Court of Pennsylvania to review a decision of that Court (R.), which affirms a final judgment of the Court of Common Pleas No. 5 of the County of Philadelphia, Pennsylvania, in favor of the Respondents.

The suit was brought by Petitioner (Plaintiff below) to recover damages for loss caused by the freezing of dor-

mant rose plants while they were being carried by the Respondents, common carriers in interstate commerce. The Respondent-carriers have denied that the goods were frozen, and each has denied that it was the delivering carrier or that it was negligent.

The facts of the case are briefly as follows:

On January 5, 1942, the petitioner, the largest rose-grower in the world, delivered to the initial carrier, a common carrier by motor truck, at petitioner's freight depot in Newark, New York, some sixteen thousand dormant budded rosebushes. The consignee was Florex Gardens, North Wales, Pennsylvania. At the time of delivery to the initial carrier, the rosebushes were in good condition (R. pp. 59a, 63a, 70a). The time of year during which they were shipped was the usual season for shipping dormant rosebushes (R. p. 109a). The bushes were delivered by the initial carrier to respondent Mushroom Transportation Co., Inc., and by the latter to respondent William Bickley, trading as Bickley's Auto Express. Possession of the bushes was given the consignee by Bickley at which time the bushes were frozen and of no value (Adjudication, R. pp. 313a, 314a).

Action in assumpsit was brought by the petitioner in the Court of Common Pleas of Philadelphia County, Pennsylvania, against Mushroom and Bickley to enforce their respective liabilities. Both denied liability. Each denied it was the delivering carrier under Section 219 of the Federal Motor Carriers Act of 1935, as amended.

The rosebushes were dormant at the time of shipment (R. pp. 55a-78a). The usual season for shipping dormant budded rosebushes is from January through March, that is, in the winter (R. pp. 109a, 135a). The rosebushes when shipped were packed with moss around the roots and with excelsior around the buds (or tops) (R. pp. 63a, 84a, 135a-136a, 162a). There were thirty-two boxes in the shipment, each being of solid wood approximately 20″ x 22″ x 44″ (R. pp. 66a, 81a, 114a, 162a). Around the bushes, the moss

and the excelsior there was wrapped a layer of thick brown insulating paper which was deposited in the wooden case (R. pp. 84a-85a, 114a). Each case was wrapped with two layers of kraft insulating paper (R. pp. 84a-85a, 163a, 257a). This is the customary and usual manner in which dormant budded rosebushes are shipped (R. pp. 63a, 76a, 135a-136a, 153a, 159a, 160a-161a).

Prior to the shipment of the bushes each box was opened and the contents examined; the bushes were found to be dormant and living; there was sufficient moss, excelsior and kraft paper to protect them (R. pp. 59a, 63a, 70a). Dormant budded rosebushes so packed stand a temperature of zero provided they are not exposed directly to the action of the elements for a considerable period (R. pp. 77a-78a, 163a, 169a-170a, 283a-284a). The temperature at the place of shipment at the time of shipment was 15 degrees above zero (R. p. 105a), and mean temperature at Philadelphia during the course of the shipment was 15, 18 and 11 degrees above zero, respectively, on January 6, 7, and 8, 1942 (R. p. 309a).

It was arranged to ship the thirty-two boxes of rosebushes to North Wales (R. pp. 58a-59a). In pursuance of the arrangement, at about 8:30 on Monday morning, January 5, 1942, he directed the loading of the thirty-two boxes in one shipment into the closed van of Goetzman and Newman of Newark, Wayne County, New York (R. pp. 81a-82a, 107a). The rosebushes were delivered by Goetzman and Newman to the Rochester, New York, warehouse of respondent Mushroom Transportation Company, Inc., some time during the morning of January 5 (R. pp. 236a-237a). Rochester, New York, is approximately thirty miles from Newark, Wayne County, New York, and the ordinary driving time is one hour and a half.

On January 7, 1942, at 10 o'clock A. M., nineteen boxes of the shipment were delivered by Bickley (R. pp. 113a, 117a, Def. Bickley's Exhibit No. 1 at R. p. 299a). When the first part of the shipment arrived it was opened and found to be frozen. This frozen condition was noted

not merely in the top bushes in each case, but in the bushes generally throughout the cases. The bushes in each box were packed in layers and that same condition was noted throughout every layer in every box (R. pp. 115a, 150a, 152a, 157a, 158a, 162a).

The rosebushes in the second part of the shipment were likewise frozen upon arrival, and were subjected to the same thorough examination by the consignee with its own workers and also examination by representatives of both petitioner and respondents (R. pp. 118a, 125a, 147a, 157a, 158a, 162a).

At the time of delivery of the first part of the shipment by Mushroom to Bickley at Mushroom's loading platform at or about 4 P. M. on Tuesday, January 6, 1942, a skim of frost or ice was noticed upon the "tall" side of the cases. The paper was stuck to the wooden box by a skim of ice and frost (R. pp. 181a, 188a, 195a). When the second shipment of boxes was received by the consignee they were taken from an *open-back* truck of Bickley's (R. p. 147a).

Four stickers or labels were pasted on the outside of the boxes in which the rosebushes were shipped (R. pp. 67a-69a, 113a, 246a, 257a). These labels read as follows:

> "This box contains living plants, highly perishable. Must be kept from extreme heat or cold. Easily frozen. Transfer points please protect from extreme heat or cold" (R. p. 67a, Plaintiff's Exhibit 4 at page 117a).

Common Pleas Court Opinion

The adjudication of the Trial Judge and the opinion of the court en banc dismissing exceptions to the adjudication found for the respondent carriers and judgment was entered in their favor.

The Opinion of the Court of Common Pleas (R. 332a) holds that dormant rosebushes are perishable and deteriorate from a cause inherent in themselves, and that accordingly the burden was upon the Petitioner to establish the

negligence of the Respondent-carriers. The Court refused to follow the Federal rule as to burden of proof and held that the burden on the Respondents was "only to show that it had used due care" (R. 338a); that the Petitioner had assumed the risk of freezing when it shipped dormant rosebushes; that there was no evidence of negligence on the part of the Respondents; and that it was unnecessary to determine which of the Respondents was the delivering carrier. Judgment was entered by the Court of Common Pleas for the Respondents.

THE OPINION OF THE SUPREME COURT

The Supreme Court of Pennsylvania, which is reported in 351 Pa. 583 (R.), affirmed the judgment of the Court of Common Pleas. The Supreme Court ignored the question of Federal burden of proof with the statement "We need not discuss Plaintiff's argument on the burden of proof". It held that freezing of the dormant rose plants was due to an inherent vice and affirmed the judgment of the lower Court.

A Petition for Re-hearing was filed on March 26, 1945, but was denied by the Supreme Court of Pennsylvania on April 9, 1945.

B. REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Pennsylvania ignored the rule that questions of the burden of proof and the quantum of proof necessary to carry that burden are matters of Federal law: *New Orleans and Northeastern Railroad Company v. Harris*, 247 U.S. 367, at 372 (1918); *Southern Rwy. v. Prescott*, 240 U. S. 632; *Central Vermont Railroad Co. v. White*, 238 U. S. 507 (1915); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942), reversing 344 Pa. 69 (1941), and failed to apply the Federal law in determining whether the respondents had exculpated themselves from liability for goods frozen while in transit: *Chicago S. W. W. R. Co. v. C. C. Whitnack Produce Co.*, 258 U. S. 369 (1922) (in which apples were frozen).

2. The Supreme Court of Pennsylvania failed to apply the Federal rule which requires that after the shipper has proved that the goods left the shipper's control in good condition and arrived in a damaged condition, the carrier must prove that the loss was caused solely and entirely by an excepted peril:—either Act of God, act of public authority, act of public enemy, act of the shipper, or inherent nature of the goods, and that failing such affirmative proof by the carrier, the shipper is entitled to recover as a matter of law: *Whitnack Case*, supra; *Schnell v. The Vallescura*, 293 U. S. 296 (1934); *Washington and G. R. Co. v. Varnell*, 98 U. S. 479; *Chic. & E. I. R. Co. v. Collins Produce Co.*, 249 U. S. 186, *aff'g*, 235 F. 857.

3. The Supreme Court of Pennsylvania failed to recognize that under the Federal rule the nature of the goods is immaterial as regards burden of proof.

4. The Supreme Court of Pennsylvania failed to apply the Federal rule requiring the respondent carriers to establish that the goods frozen while in transit were frozen solely because of prevailing temperatures sufficiently low so that the goods would freeze even though handled with due care.

5. The Supreme Court of Pennsylvania failed to realize that under the Federal rule, the test of a carrier's liability is *not* whether it performs its "contract of carriage without negligence" (R. p.) but rather, whether it brings itself within the five exceptions to a carrier's liability set forth above in Paragraph Two. By adopting the standard of care as the criterion, the court legislated a new exception into the Federal law.

6. The Trial Court permitted the respondents to avoid liability on the hypothetical ground that the goods may have frozen through no fault of the respondent and failed to apply the Federal rule that the cause of damage can never be conjectural. There was no evidence to support a finding that the goods froze as a result of temperature conditions alone. The only finding supported by the evidence is that the goods had been exposed.

7. The Supreme Court of Pennsylvania failed to apply the Federal rule that assumption of risk is not an excepted cause. If by assumption of risk it meant that the loss was due to act of the shipper, which is an excepted cause, such a conclusion was unsupported by the evidence, since the carrier offered no evidence that the loss was caused solely and entirely by act of the shipper, which, under the cases, means that the shipper either must have done some act concealing the nature of the goods from the carrier, or interfered with the carrier's treatment of the goods in transit by instructions forbidding the protection of the goods in transit by the carrier.

8. The Supreme Court of Pennsylvania has decided an important Federal question contrary to the principle enunciated by this Honorable Court in *Garrett v. Moore-McCormack Company*, 317 U. S. 239, reversing 344 Pa. 69.

The decision of the Supreme Court of Pennsylvania is of the utmost national importance, not only because of its refusal to accept the supremacy of the Federal law, but also because of the lack of uniformity which it will permit

if each state follows its own burden of proof rule. Under the decision of the Pennsylvania Supreme Court, the enforcement of a right created by Federal law no longer depends upon national uniform principles, but upon the chance circumstance that the law of the forum deems it desirable to adopt a rule on burden of proof favorable to the Plaintiff. This lack of uniformity of decision under a Federal statute enacted under the commerce power of the national Congress is a grave matter which merits the consideration of this Honorable Court.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case, numbered on its Docket No. 262, January Term, 1944, and captioned "Jackson and Perkins Company, Appellant, v. Mushroom Transportation Company, Inc., Defendant, Bickley's Auto Express, William Bickley", and that the judgment of the Supreme Court of Pennsylvania in this case may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief as may be just; and your Petitioner will ever pray.

JACKSON AND PERKINS COMPANY,
By: RONALD A. ANDERSON,
JOHN M. SMITH, JR.
Counsel for Petitioner.

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

RONALD A. ANDERSON,
JOHN M. SMITH, JR.
Counsel for Petitioner.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. Term, 194

JACKSON & PERKINS COMPANY,
Petitioner

vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, trading as BICKLEY'S AUTO EXPRESS,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE OPINIONS OF THE COURTS BELOW

The Opinion of the Court of Common Pleas No. 5 of the County of Philadelphia, Pennsylvania (R. 332a) was rendered under date of April 18, 1944.

The Opinion of the Supreme Court of Pennsylvania (R.) was rendered on March 19, 1945, and is recorded in 351 Pa. 583.

A Petition for Re-hearing was filed with the Supreme Court of Pennsylvania on March 26, 1945, but was refused on April 9, 1945.

II. JURISDICTION

1. The date of the judgment entered here by the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania, is March 19, 1945. The date of the refusal of the Supreme Court of Pennsylvania to grant a re-hearing of the case is April 9, 1945. This is a final judgment on the merits by the highest appellate Court of the State of Pennsylvania and leaves the Petitioner with no further redress except by way of certiorari issuing out of this Honorable Court.

2. This suit was predicated upon the law relating to interstate commerce carriers as modified by the acts of Congress known as the Carmack Amendment [Act of June 29, 1906, c. 3591, 34 Stat. 593, 49 U.S.C.A. Section 20(11) note]; the Newton Amendment [Act of March 4, 1927, c. 510, 44 Stat. 1448, 49 U.S.C.A. Section 20(11)]; and the Federal Motor Carriers Act [Act of August 9, 1935, c. 438, 47 Stat. 563, amended by Act of May 16, 1942, c. 318, section 3, 56 Stat. 300; amended by Act of August 7, 1942, c. 552, section 1, 56 Stat. 746, 49 U.S.C.A. Section 319], and is within the jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Honorable Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, U. S. Code Title 28, Section 344, and under Article 3, Section 2 of the Constitution of the United States.

The jurisdiction to review is well settled:

Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942), reversing 344 Pa. 69;

Western Atlantic R. R. Co. v. Hughes, 278 U. S. 496.

III. STATEMENT OF THE CASE

1. When a shipper delivers dormant rosebushes in good condition to interstate motor common carriers and the bushes upon arrival are frozen and valueless, are the carriers liable under Federal law if they fail to prove the existence of low temperatures as the sole cause of freezing and merely assert that they used due care and that the shipper assumed the risk of freezing?

2. Is a motor carrier which carries the shipment the greater part of the way and which is designated as the delivering carrier deemed to be the delivering carrier under Federal Statutes when it carries the shipment to a point to which it may lawfully transport the goods, and then reships the goods with another carrier to a point to which the carrier is not permitted to carry goods?

IV. SPECIFICATIONS OF ERROR

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania refused to apply the Federal rule relating to the burden of proof which a common carrier must present to avoid liability for damage to goods while in transit.

2. The Supreme Court of Pennsylvania erred in following the rule that the common carrier need only offer evidence denying that it was negligent.

3. The Supreme Court of Pennsylvania erred in denying recovery to the Petitioner on the ground that the damage was caused by an inherent vice or defect of the goods when there was no evidence that damage was due to an inherent quality or characteristic.

4. The Supreme Court of Pennsylvania erred in affirming the action of the Court below because the uncontradicted evidence, accepted by the Trial Judge as true, was that the dormant rose plants were shipped at the customary time for the trade, and packed in the customary trade manner so as to withstand zero temperatures provided they were not exposed by the carrier, and the carrier offered no proof as to cause of damage except that they asserted that they were not negligent and the only evidence as to temperatures was that the temperature was above that which was required to freeze the shipment unless it was exposed by the carrier.

5. The Supreme Court of Pennsylvania created an additional ground for exoneration of interstate commerce carriers by permitting the Respondents to raise the defense that the Petitioner had assumed the risk of freezing.

6. The Supreme Court of Pennsylvania failed to determine which carrier was the delivering carrier.

V. SUMMARY OF ARGUMENT

The Petitioner makes the following contentions:

1. The Federal law controls as the goods shipped by the Petitioner were shipped in interstate commerce by common carrier.

2. The Federal law holds that the common carrier is liable for damage to goods while in transit unless the common carrier shows that the damage was caused by an excepted peril, and that it did not contribute thereto in any way by its own conduct.

3. This Federal rule applies even though the goods were susceptible of being frozen.

4. Goods which are susceptible of being frozen are not regarded as subject to an inherent vice or defect, such as will free the carrier from liability when the goods freeze, unless it affirmatively establishes that the freezing was due to temperature conditions alone.

5. A carrier cannot exculpate itself from liability for freezing of goods in transit unless it affirmatively establishes that the temperatures dropped sufficiently low for a sufficient period of time as to cause freezing, and that it did not contribute in any way to their being exposed to such temperatures.

6. In the instant case the only evidence, which was accepted as true by the Trial Judge, was that the dormant rose plants were so packed that they would not freeze unless exposed to zero temperatures for several hours or more, whereas the only evidence relating to temperature was that the lowest temperature on any of the days during transit was 11° Fahrenheit. It was therefore error to conclude that the shipment had not been exposed, since only if it had been exposed could it have been frozen.

7. The Respondents did not establish that the freezing was due to an excepted peril, but left this to conjecture and merely denied that they had been negligent.

8. The evidence established that the Petitioner had not assumed any risk because it did not subject itself to any foreseeable risk when it shipped dormant rose plants during the customary shipping season and packed them according to the trade custom in such a manner as to withstand the reasonable foreseeable temperatures, provided that the packages were not exposed by the carriers.

9. The Respondent Mushroom Transportation Company is the delivering carrier.

VI. ARGUMENT

First Point

THE FEDERAL LAW OF BURDEN OF PROOF CONTROLS

As the goods for whose damage this action is brought were shipped in interstate commerce, the rights and liabilities of the parties are determined by the Federal statutes, the contract of carriage, and the principles of common law enforced in the Federal Courts: *Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co.*, 528 U.S. 369 (1922); *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209 (1931).

The Federal Motor Carriers Act of 1935 provides inter alia that "The provisions of . . . (The Carmack Amendment, as modified by the Newton Amendment) . . . shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of (common carriers by rail). . . ." Act of August 9, 1935, c. 438, 47 Stat. 563, amended by Act of May 16, 1942, c. 318, section 3, 56 Stat. 300; amended by Act of August 7, 1942, c. 552, section 1, 56 Stat. 746, 49 U.S.C.A. Section 319.

The delivering carrier, under the Carmack Amendment as modified by the Newton Amendment, is made liable to any holder of a bill of lading for any loss, damage or delay to property caused by it or any preceding carrier to whom the property was delivered: Act of June 29, 1906, c. 3591, 34 Stat. 593, as amended by the Act of March 4, 1927, c. 510, section 3, 44 Stat. 1448; 49 U.S.C.A. Section 20(11). The liability of a carrier is not that of a bailee for its own negligence only, but covers all loss or damage for which the carrier would be liable at common law: *Adams Express Co. v. Croninger*, 226 U.S. 491; *Missouri K. & T. R. Co. v. Harrison*, 227 U.S. 657; *Cincinnati etc. R. Co. v. Rankin*, 241 U. S. 319; *Chicago & E. I. R. Co. v. Collins Produce Co.*, 249 U.S. 186.

> "The statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. . . . And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law." *Southern Rwy. Co. v. Prescott*, 240 U.S. 632, 639-40 (1916).

"The question of burden of proof is a matter of substance and not subject to control by the laws of the several states": *New Orleans and Northeastern Railroad Company v. Harris*, 247 U. S. 367, at 372 (1918); *Southern Rwy. v. Prescott*, 240 U. S. 632; *Central Vermont Railroad Co. v. White*, 238 U. S. 507 (1915); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942), reversing 344 Pa. 69 (1941).

The Garrett case makes it clear that the result of litigation should not depend upon the accident of the character of the Court in which suit is brought but that the rights should remain fixed by the law which gave rise to the rights and liabilities of the parties. If, as in the case now before this Court, the cause of action is based upon Federal law, the petitioner's rights, including the rule governing burden of proof, must under the Federal Constitution be determined by Federal law.

The state court must follow the Federal burden of proof rule and must accept that rule as it is defined and applied by the Federal Courts. Any modification or any redefinition of the Federal burden of proof rule by a state court violates the petitioner's rights under the Federal Constitution and is reversible error: *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942).

It is therefore concluded that Federal law controls the decision of this case as to the substantive liabilities of the respondents, as to the burden of proof which they must meet in order to establish a defense and as to the quantum of proof they must present for this purpose.

Second Point

Carrier Must Prove Loss Caused by Excepted Peril

Under the Carmack Amendment and the Federal law, when the holder of a bill of lading proves loss or damage to the goods, the presumption arises that such loss or damage has been caused by the negligence of the carrier or its agent: *Galveston H. & S. A. R. Co. v. Wallace*, 223 U.S. 481.

Under the Carmack Amendment, a carrier is liable for failure to deliver goods safely except where the loss results solely from (1) an Act of God; (2) an act of the public enemy; (3) an act of public authority; (4) an act of the shipper; or (5) the inherent nature of the goods. Unless the loss be due solely to these excepted causes the carrier is liable and cannot excuse itself by showing inevitability of the loss, the carrier's freedom of negligence, or that it exercised the utmost possible human diligence and foresight: *Michigan Central Ry. Co. v. Owen & Co.*, 256 U.S. 427; *Commercial Molasses Co. v. N. Y. Tank Barge Corp.*, 314 U.S. 104. Even where there is evidence that the damage to perishable goods was caused in part from natural causes, the burden is on the vessel to show not only that it was not negligent, but to show to what extent the harm was due to natural causes. If the vessel is unable to show what portion of the harm can be attributed to natural causes, the shipper is entitled to recover for the full damage: *Schnell v. The Vallescura*, 293 U.S. 296 (1934).

The burden placed upon the carrier under the Federal law, which controls the instant case, is the burden of affirmatively proving that the damage was caused by an excepted peril and is not satisfied by merely showing that there was a possibility of the excepted peril's being the proximate cause of the shipper's harm.

The freezing of goods is not an excepted cause. See *Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co.*, 258 U.S. 269 (1922), in which apples shipped by rail in interstate commerce were frozen. The distinction must be made, as was done in the case of *Schnell v. The Vallescura*, 293

U.S. 296 (1934), of the difference between a cause and an effect. Just as deterioration was there held to be an effect and not a cause, freezing is an effect and not a cause.

The rationale of the rule placing the burden of proof upon the carrier is that as between shipper and carrier, the means of proving the cause of the loss lies within the control of the carrier. *Schnell v. The Vallescura*, 293 U.S. 296 (1934); *Chicago and Eastern Railroad Co. v. Collins Co.*, 249 U.S. 186, 192-3 (1919); *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 184; *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 249 U.S. 186, 192, 193; *Railroad Co. v. Lockwood*, 17 Wall. 357, 379, 380.

Possessing the superior means of establishing the cause of the shipper's damage, the carrier is bound to affirmatively prove that cause, and it is not sufficient for him to state that he used due care and on this testimony base the conjecture that the harm was necessarily due to an excepted peril. Freezing is not a cause but an effect. Consequently, the carrier does not sustain its burden of proof where goods shipped have frozen by mere proof of the freezing. The carrier cannot excuse itself by showing that it exercised diligence. It must affirmatively establish that the freezing was due to an excepted peril.

Third Point

Character of Goods Immaterial

Under the Federal rule, no change is made to the burden of proof of the basis of the goods shipped being "perishable" or "non-perishable".

In *Chicago etc. Railway Co. v. Whitnack Produce Co.*, 258 U.S. 369, an action was brought by a shipper against a common carrier by rail for damage resulting from the freezing of two carloads of apples. That case makes no distinction with regard to the burden of proof by reason of the goods being "perishable" or "non-perishable". It restates the doctrine previously applied by the Supreme Court of the

United States in the case of "non-perishable" goods and bases the rule as to burden of proof, not upon the nature of the shipment but upon availability of proof.

This rule of requiring the defendant to specifically show that harm was caused by an excepted peril rather than permitting him to avoid liability by stating that he was careful and by claiming the goods were perishable has been followed by the Federal Courts in many decisions in the carriage by sea of such goods as fruit, onions, macaroni, butterine, apples, sugar, flour, tobacco, and coffee: *Schnell v. The Vallescura*, 293 U.S. 296 (1934); *American Fed. Cas. No. 1*, 283 (D.C., N.Y. 1877); *Alliance Tobacco Co. v. U. S.*, 12 F. S. (D.C., N.Y. 1936), affirmed C.C.A. (2d) 85 F. (2d) 86; *Serio v. The Giava*, 56 F. 243 (D.C. La. 1893); *Western Mfg. Co. v. The Guiding Star*, 37 F. 641 (C.C. Ohio 1889); *Western Transportation Co. v. Downes*, 78 U.S. 129; *Callister v. U. S. Shipping Board Merchant Fleet Corp.*, 21 F. (2d) 447, *affirmed*, 30 F. (2d) 1008; *Argo S. S. Co. v. Seago*, 101 F. 999 (C.C.A. La. 1900); *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaiska*, 102 F. (2d) 530, *modified*, 103 F. (2d) 430 (C.C.A. 2, 1939); *Check Neal Coffee Co. v. Osaka Shosen Kaiska*, 36 F. (2d) 256, D.C. La. 1930, *affirmed* 39 Fed. (2d) 1021 (C.C.A. 1930); *Sparks Milling Co. v. U. S.*, 5 F. (2d) 567 (D.C. La. 1934).

No distinction can be made between carriage by sea, rail or motor carrier. The principles on which the carriage by sea cases are based are derived from common-law principles. *Schnell v. The Vallescura* 293 U.S. 296 (1934); *Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co.*, 258 U.S. 369 (1922).

Inasmuch as the reason for the rule requiring the carrier to affirmatively show that the shipper's loss is due to an excepted peril is based upon unavailability of proof to the shipper and availability of proof to the carrier, any distinction based upon the type of carrier or the nature of the goods would ignore the very basis of the rule.

It is therefore concluded that under the Federal law, which must control all shipments in interstate commerce, the

carrier cannot exculpate itself unless it affirmatively shows that the damage was caused by an excepted peril and that it is immaterial whether the goods were "perishable" or "non-perishable" or whether the carrier transports by vessel, rail or motor vehicle. In every case, he must carry the burden of affirmatively establishing his defense because the means of establishing this defense are available to him.

The Court below asserted that because the goods were perishable, the burden was on the shipper. If this were so, there would be no need for having an excepted cause "inherent nature of the goods" within which the carrier might bring itself and thus escape liability, inasmuch as a prima facie case would not be made out where the goods were in fact perishable. Consequently, the very fact that the inherent nature of the goods is an excepted cause is itself proof that regardless of the nature of the goods, the burden is upon the carrier once shipment in good condition and delivery in good condition is shown by Plaintiff.

Fourth Point

The Respondents Did Not Sustain the Burden of Proof

The burden of proof that the freezing of the petitioner's shipment was due to an excepted cause was not met by the respondents. They merely offered testimony that they had been careful.

The Trial Court below found as a fact that the dormant rosebushes were shipped in good condition, properly packed and packaged, and arrived in a frozen and valueless condition (R. pp. 312a-314a). The burden was then upon the carrier to prove that the sole cause of loss was an excepted peril.

Instead of meeting this burden of proof that the harm was due to an excepted cause, the respondents denied that

the goods were frozen (R. pp. 140a-141a) and went to great lengths to establish by cross-examination of the petitioner's witnesses that the rosebushes had not in fact been frozen.

The evidence established that the rosebushes when shipped were packed with moss around the roots and with excelsior around the buds or tops of the plants (R. pp. 63a, 84a, 135a, 136a, 162a). The rosebushes were dormant at the time of shipment (R. pp. 55a, 78a). They were packed in thirty-two boxes, being of solid wood approximately twenty inches by twenty-two inches by forty-four inches (R. pp. 66a, 81a, 114a, 162a). Around the bushes, the moss and the excelsior, there was wrapped a layer of thick brown insulating paper (R. pp. 84a-85a, 114a), and each box was itself wrapped in two layers of insulating paper (R. pp. 84a, 85a, 163a, 257a). The evidence also established that this was the customary and usual manner in which dormant budded rosebushes were shipped (R. pp. 63a, 76a, 135a-136a, 153a, 159a, 160a, 161a), and that the usual season for shipping such rosebushes is from January through March (R. pp. 109a, 135a).

Petitioner called three experts in the culture and care and shipment of roses as witnesses on its behalf. One of these was Jacob Finewood, who had been employed by petitioner as the head of its shipping and packing for thirty years, and had been familiar by reason of his experience during those thirty years with the cultivation and care of rosebushes generally and their protection from freezing. In addition, petitioner also called as witnesses the general manager and the chief rose grower of Florex Gardens, the consignee. The consignee, it should be emphasized, was not a party to the action, but was an independent third person without any interest in the controversy. Both of these witnesses had had experience for over twenty years in the culture, growing and care of roses, as well as protection of roses from freezing.

It was the unanimous opinion on the part of these experts that the freezing in question was thorough and severe

and could not have resulted other than from the direct exposure of the cases to the elements for a considerable period such as five, six, or seven consecutive hours (R. pp. 276a, 278a-284a) and that the dormant rosebushes were packed in such a manner that they would withstand temperatures of zero degrees unless exposed for some time (R. pp. 77a-78a, 163a, 169a-170a). The respondents made no attempt to contradict the testimony of these witnesses.

Respondent Bickley, in the presentation of its case, called witnesses who testified that at the time of the delivery of the first part of the shipment by Mushroom to Bickley at Mushroom's loading platform, at or about 4 p.m. on Tuesday, January 6, 1942, a skim of frost or ice was noticed upon the "tall" side of the cases. By this the witness obviously meant that side of each case having the largest area. It was further testified that the paper was "stuck" to the wooden box by the skim of ice and frost (R. pp. 181a, 188a, 195a).

Bickley, upon receiving the first part of the shipment at 4 p.m., drove the shipment a few blocks to their loading platform, from whence it was carried immediately, without being unloaded from the truck, to its garage in Jenkintown. There the cases were allowed to remain in the truck, which was parked in Bickley's garage, and the shipment was then delivered to the consignee early the next morning. The garage was not heated (R. pp. 183a, 187a).

Approximately an hour or so after delivery of the first part of the shipment to the consignee, Bickley received a call from the Philadelphia general manager of Mushroom, who stated that he was at North Wales, and inquired if the second shipment had been received by Bickley from Mushroom. He was told that it had not, and he requested Bickley to use their utmost expedition to see that the second part of the shipment was quickly delivered (R. pp. 189a, 193a). He did not tell Bickley at this time that the shipment was

frozen, though he then knew that the first part of the shipment had been received in a frozen condition (R. pp. 115a-117a, 268a, 274a).

The second part of the shipment was received in Philadelphia by Mushroom at or about 2 p.m. on Wednesday, January 7, 1942. It was called for by Bickley about 3 p.m. and taken to Jenkintown, kept in the truck in the garage overnight, and then delivered to the consignee (R. pp. 190a-191a, 201a, 208a). An employee of the consignee testified that the second shipment was delivered by Bickley in an *open-back* truck (R. p. 147a). The second shipment likewise was frozen (R. pp. 118a, 125a, 147a, 157a, 158a, 162a).

The reason given by Mushroom for failure to deliver the entire shipment on the sixth, in accordance with its regular practice of overnight service, was that it had only one truck ready to leave Rochester on Monday, January 5, and that there was not enough space left in it to carry the entire shipment (R. pp. 238a-241a). The second part of the shipment was therefore held over until the evening of Tuesday the sixth. The reason given by Bickley for its failure to make immediate delivery to the consignee was that its men belonged to the union and could not work more than a certain number of hours, in consequence of which it stored each part of the shipment overnight in its garage (R. pp. 183a-184a, 186a-187a, 190a-191a, 200a-201a).

On the following Monday, January 12, the witness Finewood, was sent by Petitioner to North Wales. He inspected both shipments, and took a sampling from each case, and assured himself that the bushes were frozen. During part of this inspection, a representative of the respondents was present (R. pp. 71a, 74a, 86a, 93a, 118a, 140a, 271a).

The consignee itself, before determining whether to accept or refuse the shipment had made a very thorough examination of each case, which necessitated the service of six men for the equivalent of a nine-hour day. This exami-

nation consisted of a careful inspection of the root tendrils of the plants to determine whether or not the tubular cell structure was decaying, and whether that decay had reached the crown (R. pp. 137a-138a, 152a, 158a-159a).

The witnesses Finewood, Lukens and Culp were in substantial accord as to the exact percentage of the rosebushes that were totally dead. All agreed that at least eighty-five percent of the shipment was totally devitalized, and could not grow (R. pp. 76a, 100a, 127a, 152a, 164a, 167a, 281a). As to the remaining plants, they were in substantial agreement that (1) a large portion of them would not live; (2) that the only way in which it could be determined what proportion of them would live would be either (a) by a detailed microscopic examination or (b) by actually planting the entire shipment (R. pp. 76a, 91a, 97a-98a, 100a, 127a, 142a-143a, 154a, 158a, 164a-165a).

The respondents in their cases, as defendants in such cases usually do, offered alleged proof that each was scrupulously careful and neglected no precaution necessary to protect the shipment.

The testimony of Bickley's showed that when the first shipment of plants arrived at their Callowhill Street platform in the late afternoon of January 6, 1942, the boxes "had paper on them, and some of the paper was like torn and the cases, they had like a slight skim of ice and frost on the bottom of them" (R. p. 181a). The box was "stuck to the paper, a slight skim of ice and frost, like, on the bottom of the cases." The bottom of the cases faced the witness as he looked at them (R. pp. 188a, 195a). This was the tall end (R. p. 194a).

The testimony of this witness, which was given on the stand before there was any prior testimony as to the position of the boxes, is in accord with that given by the witness called by Mushroom Transportation Company. This witness testified that the first boxes were loaded upon the Mushroom Company truck facing the back (R. p. 239a). It is also significant that the manager of the Philadelphia office of Mushroom Transportation Company testified that

he was called to the Florex Gardens early on the morning of January 7, and inspected the first shipment. He then immediately called Bickley's. Bickley's testified, and it was not denied by Mr. Patterson, that at the time of the phone call Patterson did not tell Bickley's that the first shipment had been frozen. The call was merely an inquiry "if his office had called me (Bickley) about another shipment of flowers coming into Florex Gardens, and I said, 'No they haven't called me as yet.' He said, 'There is another shipment coming through' and can I try to rush it there as quick as possible? I said that we cannot make same day shipment, and he said 'Do the best you can.'" (R. pp. 115a-117a, 189a, 193a, 268a, 274a).

Had Bickley's any intimation that the first shipment had been frozen, they would have, of course, at the time of the second shipment, inspected it carefully. The failure to inform of the fact that the first shipment had been frozen points towards a desire on the part of Mushroom not to have Bickley's inspect the second shipment closely.

Bickley's however, was not free from fault. The testimony of the consignee was that the bushes were delivered in a truck, the back door of which was not wooden. It was apparently a slatted gate, with a tarpaulin. Needless to say, such a rear door would not provide as ample protection for the rosebushes as would a solid wooden rear door. Bickley did not deliver the two shipments of rosebushes on the same day they were received but held each part overnight in its garage at Jenkintown, the shipments remaining in the truck. Nor was the garage heated in which the rosebushes were kept overnight by Bickley (R. pp. 182a, 187a, 201a). Furthermore, the back door of Bickley's truck was kept open on at least the second shipment, thereby improperly exposing the rosebushes, for an employee of the consignee gave the uncontradicted testimony that the back of the truck in which it was delivered by Bickley was open (R. p. 147a).

On the other hand, Mushroom had possession of the first part of the shipment from early Monday morning until late Tuesday afternoon. It had possession of the second part of the shipment from early Monday morning till late Wednesday afternoon. The direct exposure to the elements, disclosed by the evidence, may well have been suffered while the bushes were in Mushroom's possession, since it had possession of the bushes for approximately eighty percent of the time taken in transit between Newark and North Wales and for approximately ninety-five percent of the distance between those points.

In addition to this evidence, there is the testimony of the impartial witnesses called by petitioner—the general manager and the chief rose grower of Florex Gardens. This is one of the largest greenhouses in the world, with approximately two and a half million square feet under glass. The testimony of petitioner's witnesses was absolutely clear on the point that the frozen condition of the bushes upon arrival was so severe that it could have been caused only by direct exposure for a considerable period (R. pp. 77a-78a), 163a, 169a-170a, 276a, 278a-284a). Under the testimony presented on behalf of both respondents, there was no indication of direct exposure to the elements for any period. The conclusion is inescapable that the witnesses called for either one or both of defendants were not telling the truth, or at least were not telling the whole truth. At some time in transit, the bushes must have been exposed without shelter to the action of the elements for a period of five, six or seven consecutive hours (R. pp. 276a-278a, 284a).

Clearly in the instant case some carrier was negligent. The rosebushes as packed would withstand a zero temperature for several days, provided they were not exposed directly to the elements for five or more consecutive hours. The carriers were informed of the nature of the shipment, and that it should be protected from extreme cold, and that above all it should not be subjected to undue exposure or

delay at transfer points (Exhibit P-4, at R. p. 17a). Having notice of the perishable character of the goods, respondents cannot claim that they are relieved of the exercise of the degree of care necessary to protect the shipment which notice imposes upon them: See *Bell Telephone Co. v. American Ry. Express Co.*, 92 Pa. Superior Ct. 180 (1927); *Willock v. Pa. R. R. Co.*, 166 Pa. 184.

The condition of the plants conclusively shows that the bushes were, in the words of the witness Kulp, "directly exposed for a considerable period" (R. p. 276a). Each respondent, acting with knowledge of the nature of the shipment and of all the surrounding circumstances, well knew and well had reason to know that its conduct could not but help to result in harm to the shipment. Nor were the protective measures they were required to make in order to preserve the shipment unreasonable. The shipment could easily have been protected at transfer points.

There is no evidence in the record as to the care taken of the bushes in question by Goetzman and Newman, the initial carrier. It is no defense, however, to respondents to assert that Goetzman and Newman were negligent and not they, for under the law, the delivering carrier is liable for the negligence of any preceding carrier. So, if Goetzman and Newman should be presumed to be negligent, and there is no proof to the contrary, one of the respondents as delivering carrier would be liable as delivering carrier and would be entitled to recover over from the preceding negligent carrier under the Carmack Amendment.

The respondents were so concerned at the trial with seeking to establish that the dormant rosebushes were not frozen and in showing that they had been very careful, that they neglected entirely to show what caused the freezing. The uncontradicted testimony accepted as credible by the Trial Judge was that the rosebushes were so packed that they would withstand temperatures as low as zero degree, unless exposed for several hours, and that the condi-

tion of the goods was such that they must have been exposed for a considerable period. The only evidence regarding temperatures established the existence of an average temperature of fifteen degrees above zero at the point of shipment, and temperatures of fifteen, eighteen, and eleven degrees above zero, respectively, at Philadelphia on the three days relevant to the shipment.

Under the circumstances, the alternatives were then presented whether the goods froze because (1) they were exposed by the respondents, or (2) the temperatures dropped so low that the rosebushes froze although not exposed, or because (3) of a combination of (1) and (2).

Neither party presented evidence establishing which alternative was the cause of the effect of freezing. Under the Federal law, which controls the instant case, the carriers, the respondents, have the burden to sustain that there existed temperatures so low that the goods froze even though not exposed. As the record now stands, the respondents are in the position of saying to the Court that they were very careful and therefore the goods must have frozen because of low temperatures. This is not proof. This is merely conjecture, and nothing is more firmly established than that a carrier cannot be excused from liability by conjecturing that the shipper's goods might have been damaged by an excepted peril. The carrier must prove this affirmatively.

Even where the carrier has proven that the loss is due to an excepted cause, it must also show that the loss occurred solely as a result of the excepted cause and not in any part as the result of the carrier's negligence: *Washington and G. R. Co. v. Varnell*, 98 U.S. 479; *Chic. & E. I. R. Co. v. Collins Produce Co.*, 249 U.S. 186, *aff'g*, 235 F. 857. The Pennsylvania law is in accord: *Cunningham v. Penna. R. R. Co.*, 40 Pa. Superior Ct. 213 (1909).

Conjecture as to proximate cause is condemned throughout the law. The mere possibility that an excepted

factor could have been the cause of harm is not a sufficient defense: *Schnell v. The Vallescura*, 293 U.S. 296 (1934).

The Court below declared that the petitioner "voluntarily and as part of its case advanced a specific theory to account for the freezing or destruction of the rose trees by combination of weather conditions involving long exposure to high winds at low temperatures and to sunshine" (R. pp. 334a, 335a). This statement is not correct. It is true that the statement of claim alleged negligence upon the part of the respondents in that "The said defendants [respondents], well knowing and having reason to know that the said goods were perishable, and contrary to the instructions given to them, and stated on the labels on the packages in which said goods were shipped, to deliver without unreasonable delay and to properly protect the shipment from freezing, neglected so to do, and persisted in so doing contrary to their respective undertakings" (R. p. 7a).

The fact that the petitioner has advanced a theory or hypothesis for the damage to the goods does not alter the fact that the petitioner lacks the means of proving the cause of the damage for the reason that such means are in the possession of the respondents. It cannot and does not alter the burden of proof which the respondents must meet under the Federal law. The opinion of the Trial Judge likewise cites a few cases from other States to the effect that where a shipper avers a particular act of negligence on the part of the carrier, the shipper cannot recover if he fails to prove that particular act. This in substance means that a plaintiff who pleads more than he is required in order to establish his case is denied relief if he fails to prove everything he pleads even though he does present sufficient proof to establish his case. Such reverence for the pleaded averments is not paid by Pennsylvania Courts, and there is no reason why the strictness of the old common-law pleadings should be revived for the decision of this case.

More controlling, however, than any other consideration is the fact that the rights of the petitioner are to be de-

termined by the Federal law. Under that law, there is no authority for the contention of the respondents just discussed. Under that law, the respondents, irrespective of the offers of proof by the petitioner or the averments of the petitioner's pleadings, must meet at the trial the burden of affirmatively establishing that the petitioner's damage was caused by an excepted peril to which the respondents did not contribute in any way.

The Court below declares, "the susceptibility to cold is merely an inherent vice of a different nature" (R. p. 322a). This is directly contrary to the *Vallescura* case wherein it was held that deterioration is an *effect*, not a *cause*, and that the carrier to bring itself within the exception must show the damage was produced by an excepted cause. That the weather which prevailed was not an excepted cause was conceded by the Trial Judge whose adjudication states that "freezing weather coming at a season or a time when such weather may be expected, is not an act of God" (R. p. 314a).

That the liability of the respondents was likewise misunderstood is seen from the statement of the Trial Judge who quoted the Carmack amendment and then declared "It will be seen that Congress by this Act has . . . imposed liability only for loss caused by . . . carriers to whom the property may have been delivered for carriage where such loss is attributable to a breach of duty or a default on the part of a carrier" (R. p. 315a). The Trial Judge regarded this as being the equivalent of negligence despite the fact that he declares that "The Federal Rule is that 'A carrier is liable for a failure to transport safely goods entrusted to its care unless the loss or damage was due to one of the specified causes' ": *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 422 (R. pp. 314a-315a). The word "specified", when read in connection with the context of the case, clearly discloses the Supreme Court was referring to the five excepted causes of loss.

The Court below permitted the respondents to exculpate themselves by merely asserting that they were careful. By thus permitting them to defend by suggesting the possibility that there may have been such low temperatures as to have caused the freezing in spite of the way the dormant rosebushes were packed, the Court below in effect placed upon the petitioner the burden of disproving the existence of such temperatures. In substance, the lower Court placed upon the petitioner the burden of proving that the temperature at all times remained so high that it would be impossible for the rosebushes to have frozen unless they were exposed, and in the absence of proof of such high temperatures, concluded that it could be conjectured that the temperatures may have dropped so low that the bushes froze even though not exposed. Official Weather Bureaus are maintained by the United States Government at only two points along the route of shipment of the rosebushes—one at the initial point of Rochester, and the other in Philadelphia, near the ultimate delivery point of the goods. There is no means by which the petitioner could have obtained evidence of the temperatures along the route of shipment from any official source. Nor is there any means by which a shipper in the petitioner's position could anticipate a need for evidence on temperature and protect itself by reasonable action on its part.

Under the decision of the Court below, a shipper would be put to the ridiculous extreme of either accompanying the carrier, which would be prohibited by the Interstate Commerce Commission as freight carriers cannot carry passengers, or the equally ridiculous alternative of having the shipper escort the carrier in a separate vehicle. In contrast with this, the carrier can have a thermometer placed in the van of its trucks and have the driver make periodic readings. These readings would not, of course, have the same sanctity as official weather records by an impartial government department. Nevertheless, having been made

before any litigation arose, and being filed with the carrier's home office within a reasonable time after the trucks completed their runs, they would be admissible as evidence. *As between shipper and carrier, there can be no question but that the means of obtaining temperature readings along the route while the goods are in transit lies within the power of the carrier alone.* On the basis of comparative availability of such evidence, the burden of proving temperature when it is asserted as a defense should be upon the carrier.

Considerations of the administration of justice cannot pass unheeded in determining the question of burden of proof. If the carrier does not have the burden of proving abnormal temperatures, then it can exculpate itself by such loose testimony as that presented in the instant case that the respondents had used due care.

In the instant case, the truck driver for Mushroom testified that the goods had always been kept protected from exposure. With remarkable accuracy he was able to recall months later that one shipment of rosebushes had been kept free from exposure at all times. Further cross-examination showed that he had no specific recollection of other shipments, but that he recalled this specific shipment. Is it not at least remarkable, if not incredible, that the driver should, as if struck by some clairvoyant premonition, make such a mental note of this one shipment out of this one truckload out of many truckloads, and be able to recall and to state under oath that it had not been exposed? A rule of evidence which permits such proof as this to exculpate a defendant opens the way to fraud, for in the great majority of cases, barring the occurrence of some accident en route which would make the event stand out in the truck driver's memory, a truck driver or carrier would have no specific recollection of a particular shipment, and at most could only state that the goods were not exposed because they were in the habit of exercising due care. Such testimony might be truthful but would be far from proving the specific point

that the goods were not exposed at the particular time and under the Federal law is inadequate to exculpate the carrier. The only other type of testimony that the carrier could offer was illustrated in the instant case in which the care showered upon one shipment was recalled while all else was forgotten (R. pp. 253a-259a).

It is no objection that in some cases liability will be put upon a carrier when, under the circumstances of the case, it is unable to prove temperature. In such a case where temperature is not established the liability for a loss which may be due to either temperature or the carrier's neglect is placed upon the carrier. This is the Federal rule for "the carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability": *Schnell v. The Vallescura*, 293 U. S. 296, 307 (1934).

The Trial Judge concluded that the rose plants were perishable because they were labelled "perishable". It must be recognized, however, that the goods were so labelled only to call to the carrier's attention that negligence on the part of the carrier in exposing the goods to extreme heat or cold would result in the destruction of the goods. It was to serve as a warning for the carrier's benefit and for the protection of the goods, and was not a formal declaration that the petitioner should thereafter be estopped from claiming that the respondents would have the burden of proof that any harm to the goods was due to a natural cause for which they were not legally responsible.

The fact that the shipper exercises care to protect its property does not lessen in any way the duty of the carrier or reduce the burden upon it of proving that damage to the goods was due to the realization of an excepted peril: *Lehigh Valley R. R. Co. v. Russia*, 21 F. (2d) 406, *cert. den.* 275 U.S. 571.

"Perishable" on the labels was merely synonymous with "destructible" or "susceptible to injury", and does not es-

tablish as a fact that the goods are perishable within the meaning of any alleged rule of law changing the burden of proof in the case of perishable goods.

The Trial Judge reasoned that since the rosebushes were "destructible", they were "perishable". This is not the standard for determining whether goods are "perishable" in law. Man has not yet invented that which cannot be destroyed by external forces. An iron anvil will melt and run as water in the white heat of a burning train wreck. Manifestly, the anvil is susceptible of destruction, but certainly no rule of law would say that it was perishable. This illustration is not carrying the point to an absurdity, but merely brings out the distinction which analysis shows exists in the cases between goods which are subject to deterioration or destruction because of an inherent vice or infirmity and goods which are destructible only through the operation of external forces. An analysis of the cases and authorities cited by the Trial Judge reveal that the term "perishable" is only properly applied when the goods by themselves, without any change in external conditions, will by the mere lapse of time deteriorate.

In the instant case, the damage to the goods was caused not by their inherent nature, but by the operation of external elements to which they were subjected. It cannot be contended and has not been contended here that the rosebushes would have frozen in any event by reason of their inherent nature.

It can be said with certainty that it is a natural law that fruits and vegetables will decay, but it certainly cannot be said to be either a natural law or an inherent characteristic of a dormant rosebush that it will freeze: *Louisville and Cincinnati Packet Co. v. Long*, 14 Ohio Circuit Ct. N. S. 225. Particularly is this so where, as here, the only evidence reveals temperatures at which the goods could not have frozen because of the manner in which they were packed unless they were exposed for several hours.

In the *Louisville* case it was held that freezing of a

shipment of apples in transit in the latitude of Southern Ohio in December could not be attributed to an act of God or to any inherent nature of the fruit which could not be guarded against, but was due to the negligence of the carrier.

There is no doubt that at common law, a carrier is liable for its negligence when such negligence is the proximate cause of the freezing: *St. Louis and San Francisco R. R. Co. v. Dreyfus*, 42 Okla. 401 (bananas); *Merchants and Miners Transportation Co. v. L. J. Upton and Co., Inc.*, 127 Va. 406 (potatoes); *Wolf v. American Express Co.*, 43 Mo. 421 (wine); *B. Presley Co. v. Illinois Cent. R. R. Co.*, 117 Minn. 399 (holly); *Johnson v. Missouri and Pacific R. R. Co*,. 211 Mo. App. 564.

The correct rule to be applied in the instant case is that the respondent can only establish a defense by showing that the damage to the goods was due to an excepted cause. This burden is not met merely by statements that the respondents were careful.

As above stated, the rule rests upon the practical consideration that as between the shipper and the carrier, the latter is alone able to establish what occurred, and if he desires to avoid liability for destruction of the goods he must affirmatively prove that the goods were destroyed by reason of an excepted cause.

Fifth Point

Assumption of Risk Is Not a Recognized Exception to a Carrier's Liability

The Court below concluded that the respondents were not liable because the petitioner had assumed the risk of the goods freezing. By this statement the Court below probably intended to state that the loss should be regarded as "due to the act of the shipper". Unless it can be so regarded,

the assumption of risk is not a valid defense to a carrier, for apart from this construction that defense does not exist. See *Michigan Central Ry. Co. v. Owen & Co.*, 256 U. S. 422; *Commercial Molasses Co. v. New York Tank Barge Corp.*, 314 U. S. 104.

The Court below stated that the petitioner could have shipped the rosebushes by heated trucks had it been willing to pay more for their carriage. In the fact that the heated trucks could have been obtained, the Court finds an assumption of the risk of freezing by use of nonheated trucks. The lower Court also states that the petitioner knew that the rosebushes would freeze and that it was common knowledge that rosebushes would freeze and these in fact froze, and therefore the petitioner assumed the risk that they would freeze.

All this, of course, overlooks the uncontradicted testimony accepted as true by the Trial Judge, whose findings of fact were affirmed by the Court below, to the effect that rosebushes packed as the shipment in question were packed and shipped in unheated trucks in the dead of winter would not freeze unless either or both of the following conditions existed: (1) the temperature remained below zero, not merely freezing, a substantial period of time; or (2) the rosebushes were exposed by the carrier.

Admittedly the petitioner assumed the risk of condition (1), but did it either in fact or in law assume the risk of condition (2)?

It is manifest that he did not and there was no evidence that condition (1) occurred. The only evidence on point would not place the temperature at any time material to the action at less than 11 degrees above zero.

The trucks in which the bushes were carried were closed trucks and the carriers were put on notice by the label of the shipment that exposure must be avoided. The petitioner certainly did not assume that a carrier thus put on notice would expose the shipment, and it was under no duty to anticipate negligence on the part of the carriers. The effect of the action of the Court below was to prejudge

the petitioner's case. The Court in effect said to the petitioner that, since it knew the shipment could freeze, it assumed the risk of their freezing when he shipped them by unheated trucks. This bars the petitioner entirely from its day in Court, for it can never establish that it was the respondents' negligence which made it possible for the shipment to freeze if the bare fact that the shipment froze bars him from Court. The effect of the decision is to establish a rule of law that no plaintiff can recover for a frozen shipment when an unheated truck is used. This conclusion was reached by the Court below in spite of the believed testimony which established that shipments packed as these were would not freeze in a closed unheated truck unless the temperature remained below zero, and in spite of the fact that shipment in this manner during the winter was the common practice of the trade.

Did the petitioner assume any risk when it shipped in the dead of winter? It did not as a matter of law: *B. Presley Co. v. Ill. Cent. R. R.*, 117 Minn. 399, nor did it as a question of fact. The uncontradicted testimony was that dormant rosebushes were customarily shipped during the dead of winter for the reason that they would not remain dormant unless kept at a low temperature. The uncontradicted testimony accepted by the Trial Judge is the answer to the reasoning of the lower Court that it is common knowledge that rosebushes freeze and that as the shipment in question froze, the petitioner had assumed the risk that they would freeze. That testimony showed that this judicial notice taken by the Court was erroneous. The testimony established that dormant rosebushes do not freeze when shipped in dead of winter when packed in the manner of the shipment in question unless either condition (1) or (2) above stated occurs. The Court below fell into error in permitting itself to view the dormant rosebushes as ordinary delicate plants which would freeze when the temperature fell to the freezing point.

The only risk which the petitioner assumed was that the goods would freeze solely because of the lowness of the temperature, and that, in the state of the record means a sustained temperature of zero degrees. It did not assume the risk of freezing due primarily or in part to negligent exposure of the shipment by the respondents. The respondents, to exculpate themselves in accordance with the principles of burden of proof above described, must affirmatively show that the loss of the petitioner was due to the realization of the one risk which it had assumed. They cannot avoid liability by stating that they were careful, and that therefore, since they were careful, the petitioner's harm necessarily must have been caused by a risk which it had assumed. If the respondents wish to rely on the defense of assumption of risk, they must affirmatively show injury from low temperature.

Under the testimony in this case, this could only be done by proving that the temperature remained below zero a substantial part of the time while the rosebushes were in transit.

Sixth Point

Mushroom Transportation Company Is the Delivering Carrier

The Carmack Amendment defines the delivering carrier as "the carrier performing the line-haul service nearest to the point of destination, and not a carrier performing merely a switching service at the point of destination. . . ." 49 U. S. C. A. Section 20(11).

In the decision in *Missouri Pacific Railway Co. v. Reynolds Grocery Co.*, 268 U. S. 366, it was held that where the carrier designated in the bill of lading as the delivering carrier employs another carrier to switch a car from its lines to the warehouses of a consignee, the last carrier is not a delivering carrier but is merely the agent of the designated delivering carrier. In the instant case, Mushroom Transportation Company was designated in the bill of lad-

ing as the delivering carrier. It contracted to deliver the goods of the petitioner to North Wales. It had no authority to deliver goods to that point, although it had authority to go to Philadelphia, some twenty miles from North Wales (R. pp. 217a-218a, 234a, 335a). The use of a connecting carrier in the instant case was therefore essential to enable Mushroom Transportation Company to perform its contract of carriage to North Wales.

Mushroom Transportation Company should therefore be held the delivering carrier both because (1) it performed the greater haul and was the designated delivering carrier, and (2) Bickley's Auto Express was in substance the agent of Mushroom Transportation Company to enable it to perform a contract which it had undertaken but which it lacked authority to perform.

VII. CONCLUSION

The Supreme Court of Pennsylvania has rendered a decision upon a Federal question of substance in conflict with the decisions of this Honorable Court. This decision works material injury by destroying the uniformity of the law relating to interstate commerce.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and therefore that a Writ of Certiorari as prayed for should be granted, to the end that the judgment below may be ultimately reversed and that judgment be entered for the Petitioner.

Respectfull submitted,

RONALD A. ANDERSON,
JOHN M. SMITH, JR.,
Counsel for Petitioner.

Date:

SEP 4 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 214 October Term, 1945

JACKSON & PERKINS COMPANY,
Petitioner,

vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, trading as BICKLEY'S AUTO EXPRESS,
Respondents.

BRIEF ON BEHALF OF MUSHROOM TRANSPORTATION COMPANY, ONE OF THE RESPONDENTS, OPPOSING PETITION FOR A WRIT OF CERTIORARI

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CITATIONS

Cases cited:

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Blodget Co., W. H. v. N. Y. Central R. R. Co., 261 Mass. 365, 159 N. E. 45 (1927) 33, 37

Cassone v. N. Y., N. H. & H. R. R. Co., 100 Conn. 262 ..... 23, 37

Clemons Produce Co. v. Denver & Rio Grande R. R. Co., 203 Mo. App. 100, 219 S. W. 660 ..... 35, 37

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Columbia Terminals Company Contract Carrier Application, No. M. C. 48704, C. C. H. Federal Carriers Service, Paragraph 30,145.01-.02-.03-.04 43

Dietz v. Southern Pacific Railway Co. et al., 225 Mo. App. 39 22

Farmers Nursery Company v. Cowan, Receiver of B. & O. R. R. Co., 21 Pa. Superior Ct. 192 22

Harold Pollit Contract Carrier Application, No. M. C. 92044, July 30, 1942, C. C. H. Federal Carriers Service, Commission Decisions, Paragraph 30,382.01 43

Lewis v. Joyner, 113 S. E. 829 23

McGovern v. Ann Arbor R. R. Co., 165 Wis. 525, 162 N. W. 668 ..... 35, 38

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Missouri Pacific Rwy. Co. v. Reynolds Grocery Co., 268 U. S. 366 43

New York & Baltimore Transportation Lines v. Southern Pacific Co., 118 Md. 73 22

Oregon-Washington Co. v. McGinn, 258 U. S. 409 21

Pacific Fruit & Produce Co. v. Northern Pacific Ry. Co., 186 Pac. 852 37

Schnell v. The Vallescura, 293 U. S. 296 ..... 21, 31, 32

Schwartz, B. F. v. Erie R. R. Co., 128 Ky. 22106, S. W. 1188 38

Tri-State Fruit Growers' Assn. v. St. Louis-San Francisco Ry. Co. (Mo. App.), 264 S. W. 445 39

Vail v. Pacific R. R., 63 Mo. 230 38

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Statutes cited:

Federal Motor Carriers Act of 1935, 49 U.S.C.A.
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Miscellaneous cited:

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BRIEF ON BEHALF OF MUSHROOM TRANSPORTATION COMPANY, ONE OF THE RESPONDENTS, OPPOSING PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF MATTER INVOLVED

This brief is filed in opposition to a petition by Jackson & Perkins Company for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania, entered March 19, 1945, reported in 351 Pa. 583, which affirmed the judgment of the Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania in favor of the respondents. A petition for re-argument was refused by the Supreme Court of Pennsylvania on April 9, 1945.

The action was instituted by petitioner against Mushroom Transportation Company, Inc. and William Bickley, individually and trading as Bickley's Auto Express, both common carriers by motor truck, to recover damages in the amount of $2,539.19 for an alleged loss of a shipment of

dormant rosebushes claimed to have resulted from freezing.

The case was tried before a judge of the Court of Common Pleas of Philadelphia County without a jury and resulted in a finding in favor of both respondents. Exceptions to the adjudication were dismissed by the court in banc. Petitioner appealed to the Supreme Court of Pennsylvania which, in a unanimous opinion written by Mr. Justice William B. Linn, affirmed the judgment.

Petitioner, in its recital of the facts, has placed a construction upon the testimony which presents it in a light most favorable to petitioner, ignoring the rule that the findings of fact of the trial judge, affirmed by the court in banc, are entitled to the same weight as the verdict of a jury (R. p. 351). Petitioner has erroneously assumed as true the testimony of its so-called experts and other witnesses, for which there are no supporting findings by the trial judge, and, as will be pointed out, has drawn unsupportable conclusions therefrom in its argument. In addition, petitioner has omitted reference to vital facts found by the trial court which are indispensable to a proper grasp of the case.

The facts as found, for which there is ample support in the record, are as follows:

The rosebushes involved were grown in a field in California (79a, 80a). In November and December, 1941, they were removed from the field in California and packed in damp, moist moss in wooden boxes 20″ by 22″ by 3½′, lined with a sheet of paper with excelsior on top, and wrapped in a single covering of wrapping paper. They were then shipped to petitioner in Newark, N. Y. (63a, 66a, 79a, 84a, 85a, 102a, 114a). When they arrived in Newark the boxes were not unpacked but were placed in a cold storage room in petitioner's plant where a temperature of thirty-three degrees was maintained (78a-81a, 102a, 103a).

On the morning of January 5, 1942, in the dead of winter, 32 boxes of these bushes were removed by petitioner from its cold storage room in the same condition in which they had arrived and were delivered to Goetzman &

Newman, a common carrier, under a bill of lading prepared by petitioner, consigned to Florex Gardens, North Wales, Pa. (11a, 81a, 82a, 84a). No additional moss or excelsior was added to the boxes when they were delivered to Goetzman & Newman. The only additional protection given the boxes by petitioner was an extra sheet of wrapping paper on the outside. At that time the moss in the boxes contained moisture (84a, 85a, 114a).

Without previous notification, Goetzman & Newman delivered the cartons to the terminal of Mushroom in Rochester in the forenoon of January 5, 1942, and unloaded them onto a platform inside the terminal (82a-84a, 236a, 237a, 307a). This terminal is located in a building with a frontage on the street of 75′ and extending 200′ in depth. The platform, on which these boxes were placed by Goetzman & Newman, is in the rear of the building and is 75′ wide and extends out into the interior of the building a distance of 64′. The platform is not open to the street and the front door of the building is 140′ distant from the front of the platform (227a, 228a, 236a, 237a, 238a, 240a). When Goetzman & Newman unloaded the boxes, it placed them against the interior of the solid wall of the building. There are no windows in the wall and, because of a building set-off due to a railroad siding, it is not an outside wall (227a, 237a, 238a, 240a, 245a, 246a).

The regular scheduled run of Mushroom between Rochester, N. Y., and Philadelphia, Pa., starts at night from Rochester and arrives in Philadelphia the following day (211a-213a, 225a, 301a, 302a-306a). On the evening of January 5, 1942, Mushroom prepared a waybill covering the shipment and that night at eight o'clock shipped 19 of the 32 cartons to Philadelphia. Because of other shipments the trailer could not accommodate the entire shipment. The trailer which carried the 19 boxes was the only one scheduled for the Philadelphia run that night (227a, 228a, 238a-241a). The truck containing the 19 boxes moved on its regularly scheduled through-run to Philadelphia, stopping only at Williamsport for fifteen minutes to change drivers

and take on fuel, and arrived at the Philadelphia terminal of Mushroom the following day, January 6, 1942, at 1:30 p. m. (215a, 224a, 225a, 248a-250a, 252a, 266a, 267a).

The truck and trailer in which the remaining 13 boxes were shipped left Rochester at 8 p. m. on January 6, 1942, and moved on its regularly scheduled through-run to Philadelphia, stopping only at Williamsport for fifteen minutes for the purposes referred to above and arrived at the Philadelphia terminal of Mushroom the following day, January 7, 1942, at 11:30 a. m. (224a, 225a, 241a, 250a).

The trailers used in carrying these two shipments were Fruehauf trailers. Each consisted of a metal van 26′ long, which is closed on all sides and on the top. There is an air space of 4″ or 5″ between the metal exterior of the trailer and the laminated wood interior. At the rear of the van are two full length solid metal doors with veneer lining. These doors are the only means of access to the interior of the trailer. A tail gate closes over these rear doors and the doors completely seal the rear of the van. The doors were closed tight while the shipments were in transit and were closed tight upon arrival at Mushroom's terminal in Philadelphia (226a, 241a, 242a, 252a, 255a, 261a-264a).

When the two shipments arrived at the terminal of Mushroom in Philadelphia, the boxes were unloaded onto the platform in the terminal, which is located in the rear of the interior of the building and is built out from the rear brick wall. The platform is 125′ back from the doors of the terminal building. The boxes remained on that platform until called for by Bickley's Auto Express (182a-184a, 197a, 198a, 248a, 249a, 251a, 252a).

Immediately after the arrival of the first shipment on January 6, 1942, Mushroom notified Bickley of its arrival and a few hours later Bickley called with one of its trucks and loaded the shipment on it (180a, 183a, 186a, 248a-250a, 260a, 261a).

Immediately after the arrival of the second shipment on January 7, 1942, Mushroom notified Bickley of its arrival and a few hours later Bickley called with one of its

trucks and loaded the shipment on it (190a, 191a, 200a, 251a, 252a, 260a, 261a). On both occasions Bickley delivered to Mushroom a delivery receipt in which it acknowledged that the goods were "received in good condition" (196a, 197a, 199a, 200a, 251a, 252a, 260a, 261a, 293a).

The trucks used by Bickley had a panel body with a slatted gate at the rear, from which a tarpaulin operated on a rod (182a, 187a, 204a). Bickley took the two shipments to an unheated garage with doors on two sides in Jenkintown and kept them there over night (181a, 183a-187a, 190a, 191a, 200a-204a, 208a). On the morning following the respective arrivals of the shipments in Jenkintown, Bickley delivered them to Florex Gardens, the consignee, in North Wales, Montgomery County, Pa. (113a, 117a, 134a, 135a, 186a, 187a, 189a, 191a, 204a, 205a, 208a).

When the two shipments arrived at the Philadelphia terminal of Mushroom, and when they arrived at Florex Gardens in North Wales, there was no external evidence of freezing on the boxes (163a, 250a, 251a, 258a, 259a, 262a). There was testimony offered by petitioner in an effort to establish the frozen condition of a large part of the contents of the boxes upon arrival in North Wales.

Florex Gardens, the consignee, taking the position that the shipment was damaged by freezing, destroyed the bushes several weeks after they were delivered and refused to pay petitioner for them (126a). Petitioner thereafter instituted suit.

OPINIONS OF THE COURTS BELOW

The adjudication of the trial judge, in which he found in favor of both respondents, appears at pp. 310a to 329a of the record.

The per curiam opinion of the three judges of the Court of Common Pleas, sitting in banc, in which exceptions to the adjudication were dismissed, appears at pp. 332a to 339a of the record.

The unanimous opinion of the Supreme Court of Pennsylvania, affirming the judgment of the trial court, is reported in 351 Pa. 583 and appears at pp. 351a to 357a of the record.

QUESTIONS PRESENTED TO THE COURT BELOW

1. Did the respondent, Mushroom Transportation Company, meet its burden of proof under the circumstances?

(Affirmed by the Supreme Court of Pennsylvania.)

2. Was the loss alleged caused by the fault of the respondent, Mushroom Transportation Company?

(Negatived by the Supreme Court of Pennsylvania.)

3. Was the loss alleged caused by the inherent nature of the goods shipped and natural causes, the risks of which petitioner assumed?

(Affirmed by the Supreme Court of Pennsylvania.)

4. Was the respondent, Mushroom Transportation Company, the delivering carrier?

(Negatived by the Supreme Court of Pennsylvania.)

PETITIONER'S REASONS FOR THE ALLOWANCE OF A WRIT

The reasons assigned by petitioner for the allowance of a writ of certiorari appear at pp. 6 to 8 of the petition. In the light of the record, they create a wholly erroneous impression of the issues involved; they present the issues inadequately and inaccurately; and they disingenuously attribute to the highest court of the Commonwealth of Pennsylvania an abysmal ignorance of elementary principles of law relating to carriers. These reasons, read by one unfamiliar with the record, are so phrased as to create the impression that the ten Pennsylvania judges who considered this case (three in the trial court and seven in the Supreme Court), either through incompetence or defiance, rejected established legal principles applicable to the issues involved and "legislated a new exception into the Federal law", thus enabling petitioner to deplore the supposed departure from "national uniform principles", to characterize this case as a "grave matter" and to invoke a "lack of uniformity of decision" as a reason for a review by your Honorable Court.

In argument, we shall point out the reasons for the expression of these views, and the lack of merit in the petition.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The burden of petitioner's argument is that the Pennsylvania courts failed to apply the federal rule as to burden of proof in this case. It is beyond contradiction that the Pennsylvania courts did apply the federal rule to the facts and correctly concluded that there was no basis for recovery.

2. Mushroom, as an intermediate, connecting carrier, cannot be held liable because there is no proof that the loss occurred on its lines.

3. Mushroom was not the delivering carrier within the meaning of the Interstate Commerce Act.

4. There was no negligence on the part of Mushroom.

5. Petitioner's loss was caused by the inherent nature of the goods shipped, and natural causes, the risks of which petitioner, as shipper, assumed.

6. The judgment of the Supreme Court of Pennsylvania follows, and is not in conflict with, applicable decisions of federal courts.

7. The case is not one of wide interest or public importance, but concerns only the parties themselves and their respective rights under an ordinary contract of carriage.

8. There is no substantial controversy between the parties of the character required to justify a review.

9. The questions raised by petitioner are frivolous, unsubstantial, and devoid of merit under the evidence in the case.

10. There was no denial to petitioner of any statutory privilege of federal origin.

11. There has been no adverse decision against petitioner respecting the federal rule as to burden of proof.

12. The case presented a pure question of fact which was resolved against the petitioner upon uncontradicted, credible evidence.

ERRATUM

The attention of the Court is directed to the fact that the word "not" should appear on the 24th line on page 328a of the record between the words "could" and "do". This was a stenographic error and the proper correction was made by the trial judge on the original typewritten adjudication after petitioner had printed the record for the Supreme Court of Pennsylvania.

ACTS OF CONGRESS

The Interstate Commerce Act, as amended, 49 USCA sec. 20, para. (11) provides that the *initial* carrier shall be liable for loss "caused by it or by any common carrier . . . over whose lines . . . said property may pass . . . when transported on a through bill of lading . . .".

The Act further provides that "any common carrier . . . *delivering* said property . . . shall be liable . . . for . . . loss . . . *caused by it* or by any such common carrier . . . over whose lines such property may pass . . . on a through bill of lading."

The Act further provides that "the *delivering* carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination."

Part II of the Interstate Commerce Act, relating to motor carriers, was adopted August 9, 1935 (49 USCA sec. 301 et seq.) and provided in Section 219 (49 USCA sec. 319) that "the provisions of sec. 20 (11) of this title shall apply with like force and effect to receipts or bills of lading of common carriers by motor vehicle." (Subsequent amendments of May 16, 1942, and August 7, 1942, had not been enacted when the alleged cause of action in this case arose.)

THE BILL OF LADING

The bill of lading in this case was prepared by petitioner and was issued by the initial carrier, Goetzman & Newman. It provides as follows (11a, 289a):

> "RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading at Newark, Wayne Co., New York, Jan. 5, 1942 From JACKSON & PERKINS COMPANY, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water lines, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on the back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns."
>
> . . . . . .
>
> "Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided. (b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. . . . Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the

property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes. . . .

Sec. 2 (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch."

THE TARIFFS FILED WITH THE INTERSTATE COMMERCE COMMISSION

Mushroom Transportation Company is engaged in the transportation of general commodities in interstate commerce as a motor carrier under the supervision, authority and control of the Interstate Commerce Commission, which on May 31, 1941, issued to it a Certificate of Public Convenience and Necessity, which certificate was in full force and effect at the time of the shipments involved in this case, by the terms of which Mushroom was authorized (303a).

> "to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier",

and also by the terms of which:

> "It is further ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:
>
> "Regular Routes:
>
> "General Commodities, except those of unusual value, and except dangerous explosives, household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 567, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading."

At the time of the issuance of the Bill of Lading by petitioner there had been published and filed with and approved by the Interstate Commerce Commission in accordance with its requirement, National Motor Freight Classification No. 5, which said Classification included the respondent, Mushroom Transportation Company, and contained a schedule of rates, fares, charges and tariffs in force at the time of and applicable to the shipment involved in the present case. The Classification contained no tariff applicable

to the respondent, Mushroom Transportation Company, which provided for the furnishing by it of artificial heat for the protection of perishable merchandise against freezing in the territory through which the shipment moved. The Classification specified in Rule No. 23 as follows (214a):

> "The obligation to accept articles for shipment shall be subject to capacity and appropriate type of vehicles, and to requirements of ordinances of law limiting or regulating the transportation of the property or use of the vehicles.
>
> "Ratings provided on freight requiring protection from heat or cold do not obligate the carrier to provide refrigeration, heater service or trucks specifically equipped for such protection, except as otherwise provided in carrier's tariffs."

SUMMARY OF ARGUMENT

(a) The federal rule as to burden of proof was followed and applied by the courts below; the burden was placed on the respondents and sustained by their proof.

(b) There being no evidence of loss on the lines of Mushroom, petitioner cannot recover against it.

(c) Mushroom proved that it was not negligent.

(d) Petitioner's theory of recovery is erroneous.

(e) Mushroom's tariffs prohibited the furnishing of artificial heat.

(f) Mushroom was not the delivering carrier.

ARGUMENT

I. THE BURDEN OF PROOF

In its brief petitioner labors the proposition that the federal law as to burden of proof controls. Respondents have at no time asserted the contrary. They readily acknowledged during the trial that the federal law applied (171a-176a). The trial judge in his adjudication expressly held that "the federal law controls" (314a-316a). The trial court, sitting in banc, held that the trial judge "placed upon the defendants and the defendants assumed and sustained the burden of proof that they used due care in handling the shipments" (337a) and that "*both defendants met the burden of proof cast upon them . . .*" (338a; italics of the court in banc). The trial court in banc also held that no burden was placed upon petitioner by the trial judge to show temperatures at points through which the shipments moved and pointed out that petitioner as part of its own case proved that the plants froze and introduced testimony as to temperatures. It then observed that there was no evidence from which exposure of the plants by the carriers could be found or inferred and said: "There was no factual evidence by anyone to substantiate the plaintiff's theory, which, at best, was only a guess" (335a). The trial court in banc then concluded its opinion by confirming the conclusion of the trial judge that "the loss in this case was not caused by the failure of defendants to properly perform their duties as common carriers by motor vehicle under the law applicable under the circumstances, or their contract with the plaintiff as evidenced by the bill of lading and the carriers' tariffs on file with the Interstate Commerce Commission, and was not caused by any negligent act or fault on the part of the defendants, but was caused by the inherent nature of the goods shipped, and natural causes, the risks of which the plaintiff, as shipper assumed" (339a).

Thus, petitioner by its own proof brought its case within two exceptions to an interstate motor carrier's liability, i. e., an act of the shipper and the inherent nature of the goods.

The Supreme Court of Pennsylvania (351 Pa. at 585; R. p. 351a) said:

> "The plants were frozen and of no value when delivered to the consignee, facts making a prima facie case against the defendants. The defendants are liable unless the record shows they discharged their obligation to transport and deliver."

And at 351 Pa. at 591; R. p. 357a:

> "The evidence supports the conclusion that the damage resulted from the shipment of property liable to freeze during the low temperatures stated above, in unheated transportation facilities and that defendants performed their contract of carriage without negligence."

Thus, it is apparent in the record that the burden on Mushroom was met by proof that the injury resulted from excepted causes, i. e., the act of the shipper and the inherent nature of the goods, and that Mushroom omitted no duty of care in transporting the goods.

The vice of petitioner's contention, as will more fully appear later in this brief, lies in its *assumption* that it was *impossible* for the plants to have frozen except as the result of negligent exposure. Petitioner does not really mean that the Pennsylvania courts failed to apply the federal rule as to burden of proof. Its *real* complaint is that the trial judge did not find as a fact that the bushes could not have frozen except for negligent exposure. This was a matter for the trial judge as a trier of fact and his refusal to find the facts necessary for the support of petitioner's theory was within his exclusive province and is conclusive.

There was no failure on the part of Mushroom to establish that the injury was from an excepted case, as suggested by petitioner. The evidence abundantly demonstrated that the cause of the loss was freezing.

There is no legal rule which requires a carrier by its own proof to establish that the loss was caused by an excepted peril. It is enough if the facts appear in the case. If, for example, a shipper should prove as a part of his case the fact that his shipment was destroyed while in the possession of the carrier by saboteur agents of a foreign government with which this country was at war, could it be contended that the shipper could recover simply because the carrier did not prove the sabotage? Since petitioner proved that the loss resulted from freezing, the carrier has met its burden by adducing evidence to support the finding of the trial judge of due care on its part in transporting the goods.

The Supreme Court of Pennsylvania did not hold or even intimate that freedom from negligence is an exception within which a carrier may bring itself to avoid liability, as suggested by petitioner. The trial judge and the Supreme Court of Pennsylvania held, consistently with a long line of cases, that the law as applied to the facts in this case imposes no duty on the carrier to "insure against the effect of this natural law" (351 Pa. at 591; R. p. 357a); that the "Defendants were not insurers against loss resulting from the inherent nature of the plants" (351 Pa. at 585; R. p. 351a); that "the transportation in unheated vehicles during the low temperature prevailing and to be expected at that time of the year was an error of judgment on the part of the shipper" (351 Pa. at 590; R. p. 355a); that "This moisture constituted an inherent infirmity during freezing weather exactly as the moisture in fruit and vegetables constituted an infirmity during freezing weather, or during excessive heat" (351 Pa. at 591; R. p. 357a).

The Supreme Court of Pennsylvania approved the finding of the trial judge that if the bushes froze the result was due to:

> ". . . The inherent nature of the goods shipped, and natural causes, the risks of which the plaintiff, as shipper, assumed" (351 Pa. at 585; R. p. 351a).

In *Schnell v. The Vallescura*, 293 U. S. 296, on which petitioner relies, it is held:

> "Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent."

Therefore, when the Supreme Court of Pennsylvania referred to and approved the finding of the trial judge that Mushroom "omitted no duty of care", it followed the rule announced in the Schnell case and affirmed the judgment because the evidence showed that the loss resulted from an excepted peril. Obviously, the court was not attempting to make the absence of negligence an additional exception to a carrier's liability. The court in referring to the question of negligence had the federal rule of liability firmly in mind and found that the trial judge was right in finding that the "defendants had kept the shipments 'from extreme heat or cold' ", and that the damage "was not caused by any negligent act or fault on the part of the defendants."

The plaintiff's theory of recovery will be considered more closely under Part IV of this brief.

II. THERE BEING NO EVIDENCE OF LOSS ON THE LINES OF MUSHROOM TRANSPORTATION COMPANY, PETITIONER CANNOT RECOVER AGAINST IT.

The proposition is firmly settled in the law of carriers that a shipper cannot recover as at common law from an intermediate carrier in interstate commerce unless the shipper affirmatively proves that the loss occurred on that carrier's lines.

In *Oregon-Washington Co. v. McGinn*, 258 U. S. 409, this Court said:

> "The settled federal rule is that, in the absence of statute or special contract, each *connecting carrier* on a

through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier, Myrick v. Michigan Central R. R. Co., 107 U. S. 102, 107; Railroad Co. v. Manufacturing Co., 16 Wall. 318, 324, and the liability of a connecting carrier for the safety of property delivered to it for transportation, commences when it is received and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent. Pratt v. Railway Co., 95 U. S. 43." (Italics supplied.)

To like effect see *Dietz v. Southern Pacific Railway Co. et al.*, 225 Mo. App. 39; *New York & Baltimore Transportation Lines v. Southern Pacific Co.*, 118 Md. 73; *Farmers Nursery Company v. Cowan, Receiver of B. & O. R. R. Co.*, 21 Pa. Superior Ct. 192; *Barron Bros. v. New York & R. Co.*, 31 Ga. App. 757, 172 S. E. 83.

It has been shown that Goetzman & Newman was the initial carrier; that Mushroom was the connecting or intermediate carrier and that Bickley was the terminal or delivering carrier. In order for petitioner to recover from Mushroom, it was incumbent upon it to prove that the alleged loss occurred while the shipment was in the possession of Mushroom in transit upon its lines. There was no evidence whatever to establish where the alleged loss occurred during its transportation from Newark, N. Y., to North Wales, Pa., and it will not be contended by petitioner that there is any evidence from which any conclusion on that point can be made. Petitioner has therefore failed to sustain the burden which the law imposes upon it and it cannot recover against Mushroom.

There is a presumption of negligence on the part of Bickley, the delivering carrier. That principle is announced in many cases and reference to *Dietz v. Southern Pacific Railway Co. et al.*, supra, will be illustrative. The Court there said:

"Furthermore, the provisions of the Carmack Amendment have in nowise abrogated or changed the usual presumption, that goods shown to have been delivered in good condition to the initial carrier remained

in that condition to the time of their delivery to the last or delivering carrier, and that the injury or loss occurred while the goods were in the last carrier's possession. Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co., 258 U. S. 369, 42 S. Ct. 328, 66 L. Ed. 665; State ex rel. v. Taylor, 298 Mo. 474, 251 S. W. 383; Johnson v. Missouri Pac. R. Co., supra; Durnford v. Chicago, B. & Q. R. Co., supra."

See also *Cassone v. N. Y., N. H. & H. R. R. Co.*, 100 Conn. 262; *Lewis v. Joyner*, 113 S. E. 829. (See many other cases to like effect appearing in the annotations at page 220 of 49 USCA Sec. 20 (11).)

This contention was urged on behalf of Mushroom in the trial court and on appeal in the Supreme Court of Pennsylvania. The case was decided favorably to Mushroom on different grounds, however, and it was therefore unnecessary for the Pennsylvania courts to refer to the principle just discussed.

The significant fact is, however, that the petitioner has made no attempt at any time during this litigation to contradict the rule of law to which reference is herein made, or to distinguish the facts of this case from those in the several decisions in which the rule has been applied.

We submit that the rule is a conclusive bar to recovery against Mushroom.

III. THERE WAS NO NEGLIGENCE ON THE PART OF MUSHROOM TRANSPORTATION COMPANY.

The proof fully sustained the finding of the trial judge that Mushroom was free from negligence.

Without previous notification, the initial carrier, Goetzman & Newman, delivered the shipment at the terminal of Mushroom in Rochester in the forenoon of January 5, 1942, and unloaded it upon a protected platform in the interior of Mushroom's terminal. In the early evening

of the same day Mushroom loaded nineteen of the thirty-two cartons comprising the shipment onto a truck which went forward to Philadelphia and arrived the following day on schedule time. The remaining thirteen cartons could not be loaded on January 5th because other merchandise filled the truck. These thirteen cartons were shipped the following evening, January 6th, and arrived in Philadelphia the following day on schedule time.

Both shipments were carried in modern, well-equipped Freuhauf trailers, which have been described above. The doors were closed while the shipments were in transit and were closed upon arrival of the shipments in Philadelphia.

Immediately upon arrival of the shipments in Philadelphia, they were unloaded upon a protected platform in the interior of Mushroom's Philadelphia terminal. Bickley was immediately notified of the arrival and subsequently called for the boxes and later delivered them to the consignee at North Wales (293a, 295a).

Bickley's trucks, unlike those of Mushroom, were not completely sealed at the rear. Bickley's trucks had a panel body with a slatted gate at the rear, from which a tarpaulin operated on a rod. Each shipment after it was called for at Mushroom's terminal by Bickley was taken by the latter to his garage in Jenkintown and kept there over night. This garage was unheated and had two doors. The shipments were delivered at North Wales on the morning of the following day. As to the second shipment, which was delivered on January 8th, there was testimony by witnesses connected with Florex Gardens, the consignee, that the rear of Bickley's truck was open and unprotected.

Petitioner refers to the testimony of William J. Bickley, son of the defendant Bickley, relating to a "slight skim of ice" on the paper of the boxes comprising the first shipment. His testimony was challenged in the court below on the ground that it was not worthy of belief. Mushroom's platform manager at its Philadelphia terminal denied that

there was any external evidence of freezing. Credible witnesses connected with the consignee, who testified for the plaintiff, expressly stated that there was no external evidence of freezing on the boxes. In view of the hostile, evasive and inaccurate testimony of William J. Bickley, his testimony in that respect was without weight and was not accepted by the trial judge (327a). Even if it be assumed that the first shipment bore external evidence of freezing, it did not establish that there was internal freezing when Bickley received the goods. When the alleged freezing occurred or under what circumstances would be left entirely to speculation. The court could not guess or impose inference on inference. Moreover, under the authorities, mere freezing is not a sufficient basis upon which to ground recovery. The loss must have been "caused" by the negligence of Mushroom, which not only does not appear in the record but was clearly disproved by its uncontradicted evidence.

It is difficult to imagine how a carrier could more clearly show freedom from negligence than Mushroom has in this case. It proved without contradiction the prompt and expeditious shipment of the merchandise to Philadelphia. Its recital of the circumstances surrounding the shipment was utterly free of any suggestion of irregularity. Its witnesses traced the shipment from the moment it was received at Rochester until it was delivered to the terminal carrier, Bickley, in Philadelphia. It was shown without denial that the shipments were received and unloaded in a protected terminal in Rochester and there sheltered until they were loaded on modern, well-constructed and well-insulated trailers. The trailers proceeded on their regularly scheduled runs without mishap or interruption en route and arrived in Philadelphia on schedule time. No deliveries were made en route at intermediate points. The rear doors of the trailers remained closed and sealed throughout the transportation. As soon as they arrived they were unloaded in a protected terminal in Philadelphia and the delivering carrier, Bickley, was immediately notified.

The trial judge found that the loss "was not caused by any negligent act or fault on the part of the defendants" (329a). From this finding which is supported by undisputed, credible evidence, it follows that if the bushes froze the result was due to "the inherent nature of the goods shipped, and natural causes, the risks of which the plaintiff, as shipper, assumed" (329a).

The trial judge expressly found that "the evidence of the defendants shows that they took all the reasonable precautions that they were required to take in regard to this shipment. They provided suitable transportation and exercised the degree of care which the nature of the shipment required" (322a, 324a-328a).

The trial court further found: "We feel that we are bound to find from the evidence adduced by the defendant, Bickley, that it has sustained the burden cast upon it as a delivering carrier of showing that it was not guilty of negligence which was the proximate cause of the loss in this case. The same must be said with respect to the evidence adduced by the defendant, Mushroom Transportation Company, . . ." (328a, 329a).

The trial court further concluded that "the loss in this case was not caused by the failure of defendants to properly perform their duties as common carriers by motor vehicle under the law applicable under the circumstances, or their contract with the plaintiff as evidenced by the Bill of Lading and the carriers' tariffs on file with the Interstate Commerce Commission, and was not caused by any negligent act or fault on the part of the defendants, . . ." (329a).

The Supreme Court of Pennsylvania (351 Pa. at 589; R. p. 355a) said:

> "The evidence supports the fact, implicit in the conclusion of the learned judge, that defendants omitted nothing, provided for by their tariffs, that would prevent subjecting the plants 'to extreme heat or cold,' while in transit or at rest."

IV. PETITIONER'S THEORY OF RECOVERY IS ERRONEOUS

Petitioner's statement of claim in paragraphs 22, 23 and 27 (7a, 8a) affirmatively pleaded negligence on the part of both defendants "in not protecting the said goods from cold and their negligent detention and delay in the transportation of the said goods." Petitioner failed to prove negligence and there was no evidence or detention or delay (351 Pa. at 590; R. p. 356a).

On appeal to the Supreme Court of Pennsylvania petitioner therefore adopted a new theory. In doing so, it fell into the error of assuming as true everything its witnesses said, forgetting the rule that requires the evidence to be viewed in a light most favorable to the respondents in view of the trial court's finding, and overlooking the principle that the court, as stated by the trial judge during the trial, does "not have to take the opinion of any expert" (276a) and, as stated by the Supreme Court of Pennsylvania (351 Pa. at 590; R. p. 356a): "The value of the opinion evidence was, of course, for the trier of facts: compare Ray v. Philadelphia, 344 Pa. 439, 25 A. 2d 145; Com. v. Shults, 221 Pa. 466, 70 A. 823."

The difficulty with petitioner's position is its persistence in advancing the erroneous contention that the trial judge had to accept everything its so-called experts said merely because their testimony was not contradicted. Petitioner relies on the trial judge's *reference* to the testimony of petitioner's witness, Finewood, to the effect that rosebushes, packed as petitioner packed them, would withstand a temperature of zero and possibly a little below if they are properly handled in transit (312a). Finewood first testified "Sure" in answer to a question by the trial judge whether the bushes would withstand that temperature "for a certain period" (78a). Under cross examination the witness testified in answer to a similar question: "A few hours possibly", and later "Maybe a couple of hours." Finally he testified as follows (100a):

"Q. Will you give us, or are you able to give us, Mr. Finewood, a positive statement of your opinion on that. You say a few hours, and you say maybe two hours; I would like for you, if you can say so, based upon the experience and work that you have testified to, how long this shipment as it was packed would withstand a temperature of zero, how many hours?

A. I don't know.

Q. You don't know?

A. No."

Petitioner also relied on the opinion of one of its *own* witnesses that the shipment "must have been directly exposed" (276a), but in answer to a question as to how much exposure was necessary to produce the condition in which the bushes were claimed to have been found, the witness acknowledged "that is rather difficult to answer," and then said: "I believe five or six hours, or possibly seven hours of exposure", followed by a reference to certain other qualifying factors which might affect his opinion, and without any attempt by the witness to testify with respect to the physical conditions which would have to prevail during the five to seven hour exposure to produce the result complained of (278a).

The trial judge referred to the testimony of the plaintiff's witnesses merely *in narrative form* in discussing the "evidence" which was "produced" by petitioner (320a). The trial judge merely observed that petitioner's witnesses *testified* that exposure "might" have caused the alleged damage (328a). *He nowhere found such to be the fact.* He did not accept the testimony "as true" and conclusive, as erroneously and persistently suggested by petitioner, nor did the trial judge find or conclude that the goods were exposed by the defendants "for a considerable period" as stated in the petition (pp. 27, 28). The exact contrary is true, as fully appears in the adjudication and the opinion of the trial court in banc.

Upon the basis of such testimony, which the court was not bound to credit and which, in any case, is far from conclusive, petitioner bases an argument which, as we understand it, is:

(a) The bushes were so packed as to withstand a temperature of zero.

(b) The bushes would not withstand a temperature of zero if exposed for five to seven hours.

(c) Since the bushes were frozen and the defendants did not prove that the temperature went to zero it must be concluded that there was negligent exposure.

Apart from the fact that the factual premise of this argument is based upon an untenable construction of the evidence, the conclusion which petitioner attempts to draw from it is not sound. Petitioner pleaded in its statement of claim and offered in evidence at the trial labels claimed to have been affixed to the cartons which emphasized that the plants were "highly perishable" and "easily frozen." This acknowledgment of perishability is in the teeth of the testimony of petitioner's witnesses. It is conclusive evidence that petitioner was fully aware of the danger of shipping these goods in the dead of winter, and demonstrates that the trial court in banc was right in stating that "it has become common knowledge that they [rosebushes] do freeze and are killed by freezing." (334a).

The Supreme Court of Pennsylvania (351 Pa. at 591; R. pp. 356a, 357a) said: "It is common knowledge that moisture subjected to low enough temperature will freeze, whether it be the moisture in moss around such roots or moisture in fruit and vegetables."

Moreover, assuming that petitioner's witness was right in stating that the bushes would have withstood zero for five to seven hours, *it is plain that the bushes would have frozen after longer periods of higher subfreezing temperatures.*

Petitioner contends that the respondents, in order to escape liability, were obliged to prove that there existed temperatures so low that the goods froze even though not exposed, and that the respondents were required to show that the temperature had been below zero. Such reasoning is imperfect.

Petitioner proved that the temperature in Newark, N. Y. on the date of the shipment was fifteen degrees above zero (106a). By stipulation filed (309a) it appears that the average mean temperature prevailing in Philadelphia on January 6, 1942, when the first shipment arrived, was fifteen degrees; that on January 7th, when the second shipment arrived and the first one was delivered in North Wales, it was eighteen degrees, and that on January 8th, when Bickley delivered the second shipment in North Wales, it was eleven degrees.

How, in this state of the record, can petitioner argue with reason that it was "conjecture" by the trial judge that the temperature was low enough to freeze the goods?

Petitioner argues that the respondents should have proved that the temperature dropped low enough to freeze the bushes, notwithstanding the fact that petitioner in its case proved subfreezing temperatures, and notwithstanding petitioner's admission in its petition (p. 31) that "Official Weather Bureaus are maintained by the United States Government at only two points along the route of shipment of the rosebushes—one at the initial point of Rochester, and the other in Philadelphia, near the ultimate delivery point of the goods."

Realizing the impossibility of proving a fact which it contends it was the respondents' burden to prove, petitioner suggests that respondents' trucks should have been equipped with thermometers from which the drivers could have made readings every mile or so en route. No such burden has ever been placed on any carrier by any court, and petitioner cites no authority to sustain any such novel and impracticable proposition.

Petitioner's argument ignores realities and assumes, incorrectly, that the plants could have frozen in only two situations; i. e., first, if the temperature dropped below zero and second, if the defendants negligently exposed the goods. As stated, the argument overlooks the actuality that the plants could freeze without negligent exposure if subjected to a freezing temperature for a longer period than five to

seven hours. This is precisely what happened and the court below so found.

If, in addition to requiring proof by carriers of due care, the law should require in a case of this kind proof of temperature at every point along the entire course of an interstate shipment of goods, no carrier could defend because of the practical impossibility of meeting such a burden, and every carrier would be an insurer against freezing, without regard to negligence and its published tariffs. Petitioner's theory is without support in reason or in law.

When petitioner contends that the carriers failed to meet their "burden of proof" it *means* that the carriers failed to prove that the temperature went to zero. That is the sum and substance of petitioner's argument on burden of proof. It is patently without merit. Petitioner contends that the carrier must by its own proof show that the damage was due to an excepted cause and that because the carrier offered no evidence as to what caused the freezing, it did not meet its burden of proof. Petitioner misconceives the meaning of "burden of proof." The burden of proof is the duty of going forward with evidence. If petitioner in its own case shows the cause of the loss, as it did here, there is no occasion for independent proof of the same facts by the carrier. Petitioner in its own case proved subfreezing temperatures, and offered evidence to prove that the bushes were frozen on arrival. In arguing that the carriers did not show what caused the freezing, petitioner is completely unrealistic. As the Supreme Court of Pennsylvania said (351 Pa. at 585; R. p. 352a):

> "We need not discuss plaintiff's argument on the burden of proof; the evidence is in the record; the only question now is whether the law was correctly applied to the evidence. If, on the evidence, a jury could not find for the defendants, the judgment must be set aside."

Schnell v. Vallescura, 293 U. S. 296, upon which petitioner relies, is not parallel to the instant case. In that case the action was to recover damages against a vessel due to decay in a shipment of onions. The trial judge found that

the carrier was guilty of "negligence in failing to provide proper ventilation." Petitioner relies upon the case as authority for the proposition that the burden rests upon the carrier to bring itself within any exception relieving it from liability.

In the case at bar it was found by the trial judge that petitioner's loss "was caused by the inherent nature of the goods shipped and natural causes, the risks of which the plaintiff, as shipper, assumed" (329a). It is therefore apparent that the alleged loss comes within exceptions noted in the bill of lading.

In the Vallescura case this Court said:

> "It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it."

No such evidence was produced in the instant case.

This Court further pointed out in the Vallescura case that if the carrier fails to show that the damage is from an excepted cause, the burden is upon him to show that the damage was not due to failure properly to stow or care for the cargo during shipment. The Court said:

> "Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or show that he has not been negligent."

The record shows that the loss occurred as a result of excepted perils and that the carriers were not negligent. This meets the test laid down in the Vallescura case.

V. MUSHROOM WAS NOT REQUIRED TO HEAT ITS TRUCKS

There was no obligation on the part of Mushroom to furnish heat in its trailers or garage to protect goods from

freezing. It had no authority to do so and if it had offered such service, it would have violated its Certificate of Public Convenience and Necessity issued by the I. C. C. The evidence conclusively established without contradiction that the classification containing Mushroom's schedule of rates, in force at the time the shipment in question was made, contained no tariff applicable to Mushroom which provided for the furnishing by it of heat for the protection of perishable merchandise against freezing in the territory through which it moved. The mere fact that the shipment, or part of it, froze, does not establish liability on the part of Mushroom, the connecting carrier, or on the part of the initial or delivering carriers.

A case strikingly similar to the case at bar, which we submit is controlling, is *W. H. Blodget Co. v. N. Y. Central R. R. Co.*, 261 Mass. 365, 159 N. E. 45 (1927). In that case a consignee of an interstate shipment of celery brought an action to recover damages arising from its injury by freezing while in transit between Rochester, New York, and Worcester, Mass. The bill of lading in that case was identical in form to the bill of lading in the instant case. The defendant in that case acknowledged receipt of the merchandise under a bill of lading which read, as in the case at bar, "subject to the classifications and tariffs in effect on the date of the issue of this Original Bill of Lading". In that case, as in this, the classification containing the carrier's schedule of rates, fares and charges in force at the time the shipment was made and applicable thereto, contained no tariff applicable to the defendant or to any other railroad company which provided for the furnishing by the carrier of heat for the protection of perishable merchandise against freezing in the territory over which the shipment moved or in the Eastern states generally. The Court in its opinion recited the provisions of the bill of lading, which contained precisely the same language as the bill of lading in the instant case, and in entering judgment for the carrier said in part as follows:

"The first question is whether the defendant is liable at common law for the injury arising while the celery was in transit. A common carrier generally is practically an insurer of goods in its possession. This rule, however, is subject to certain well recognized exceptions. A carrier is not liable for loss or damage arising from an act of God, from the public enemy, nor for the destruction of goods or injury due to their inherent nature, if the negligence of the carrier did not occasion or contribute to the injury. It has been held that where perishable goods such as fruit and vegetables are injured or destroyed in transit, the carrier is not liable if its own negligence did not cause the injury. It was said in Swetland v. Boston & Albany Railroad, 102 Mass. 276, at page 283: 'If the owner of goods, which are liable to be injured by freezing, chooses to send them at a season of the year when they are exposed to such risks, he takes the risk himself.' A carrier, in the absence of an agreement to do so, is not bound to heat cars to protect perishable goods from freezing. McGovern v. Ann Arbor Railroad, 165 Wis. 525; McGraw v. Baltimore & Ohio Railroad, 18 W. Va. 361; Cassone v. New York, New Haven & Hartford Railroad, 100 Conn. 262; Ross v. Maine Central Railroad, 112 Maine 63; Schwartz & Co. v. Erie Railroad, 128 Ky. 22; Vail v. Pacific Railroad, 63 Mo. 230; Standard Pickle Co. v. Pere Marquette Railway, 222 Mich. 639; White v. Minneapolis & Rainy River Railway, 111 Minn. 167; Atlantic Fruit Co. v. Pennsylvania Railroad, 149 Md. 1; Leypoldt & Pennington Co. v. Davis, 112 Neb. 350.

"In the case at bar the goods were shipped about the middle of December, a time in this climate when freezing weather is not unusual, but might reasonably be expected. There is nothing in this record to show that the cause of injury to the shipment was so unexpected, unusual, or extraordinary as to be said to have arisen from an act of God. Such weather is an event which, according to common experience, naturally might be expected. The case can not be distinguished in principle from Swetland v. Boston & Albany Railroad, supra, and is governed by it.

"It is manifest that at common law the defendant can not be charged with liability merely because heat was

not furnished to protect the celery. . . . This was a shipment in interstate commerce and was received for transportation subject to such classification and tariffs. Thereunder the carrier was not required to furnish heat, but the shipper might do so. The rates were published under the requirements of the interstate commerce act and are binding upon all parties engaged in interstate transportation. The shipment was made under the standard bill of lading issued by the defendant in conformity with the Cummins amendment to the interstate commerce act. U. S. St. 1915, c. 176; 38 U. S. Sts. at Large, 1196. The rights and liabilities of the parties are governed by the Act of Congress, the bill of lading, and the tariffs duly filed with the interstate commerce commission. . . . The shipper and consignee knew or were charged with knowledge of these provisions. . . .

"Not only was the defendant under no obligation to heat the car to protect the celery from freezing, but, under the provisions of the classifications and tariffs, it had no legal right to do so. . . ."

See also *Clemons Produce Co. v. Denver & Rio Grande R. R. Co.*, 203 Mo. App. 100, 219 S. W. 660; *McGovern v. Ann Arbor R. R. Co.*, 165 Wis. 525, 162 N. W. 668.

VI. THE PLAINTIFF ASSUMED THE RISK OF FREEZING TEMPERATURES

The shipment was delivered by petitioner on January 5, 1942, in northern New York state. Clearly, freezing temperatures could readily have been anticipated at that time of the year. Yet petitioner shipped these boxes, containing a large quantity of moisture, in the same cartons in which they had been received from California, where there is a temperate climate, without changing the wrapping or protecting the bushes, except to add a sheet of wrapping paper on the outside. Moreover, there was no previous notice given to Mushroom of petitioner's intention to ship the goods. The first knowledge acquired by Mushroom was

when it found the boxes on its protected loading platform in the interior of its terminal in Rochester. As shown by the cases cited elsewhere in this brief, petitioner was bound under the law to know the limitations and restrictions imposed upon Mushroom by its Certificate of Public Convenience and Necessity and its published tariffs.

The complete shift in petitioner's position with respect to the perishability of these bushes should be noted. In paragraph 16 of the statement of claim (6a) petitioner alleged that the goods involved were "perishable". In paragraph 18 (7a) it alleged that labels were attached to the cartons, "which bore instructions that the contents were perishable, easily frozen, and must be kept from extreme heat or cold", and at the trial the labels were offered in evidence and the perishability of the bushes was stressed by petitioner. Yet, in petitioner's brief the position is taken (pp. 33, 34) that the goods shipped in the instant case were not perishable; and an attempt is made to explain away the "perishable" quality of the goods which it had taken such pains to plead and prove, by stating merely that petitioner meant that the goods were "susceptible to injury". This contention is so transparent that if any answer at all is required it is found in the following language in the opinion of the court in banc (334a):

> "Rosebushes have been so universally grown in all countries in the temperate zones for so many hundreds of years that it has become common knowledge that they do freeze and are killed by freezing".

The Supreme Court of Pennsylvania (351 Pa. at 591, R. p. 356a) said: "We must reject appellant's argument that this was not a perishable shipment, though so described by it."

It is not material to the question of the respondents' liability that the cartons bore labels on which the word "perishable" appeared. ". . . the bill of lading issued by the initial carrier in an interstate shipment governs the entire transportation and fixes the obligations of all par-

ticipating carriers to the extent of its valid terms. . . .": *Cassone v. N. Y., N. H. & H. R. Co.*, 100 Conn. 262, 270.

"The rights and liabilities of the parties are governed by the Acts of Congress, the bill of lading, and the tariffs duly filed with the interstate commerce commission. . . . The shipper and consignee knew or were charged with knowledge of these provisions. . . . Not only was the defendant under no obligation to heat the car to protect the celery from freezing, but, under the provisions of the classifications and tariffs, it had no legal right to do so": *W. H. Blodget Co. v. New York Central R. R. Co.*, 261 Mass. 365. Petitioner could not by the mere device of sticking labels on the boxes impose upon Mushroom an obligation which, under the law, it had no duty to assume or right to perform.

There is no evidence that Mushroom failed in any way to comply with the terms of the labels, although, as we have pointed out, it was under no obligation to do so. Prompt and careful transportation of the merchandise by Mushroom in modern, well-equipped trucks was fully established by the testimony. It fully complied with its duty as a carrier under the law. Mushroom was not obligated to furnish heat. The rule is announced in *Pacific Fruit & Produce Co. v. Northern Pacific Ry. Co.*, 186 Pac. 852: "A carrier in interstate commerce can enter into no contract of transportation for which there is no express authority in its filed and published tariffs. T. & P. R. Co. v. American Tie Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255."

Petitioner well knew the character of the rosebushes which comprised the shipment. But on the bill of lading which constitutes the contract the goods were described merely as "boxes dormant trees". Such a description is completely misleading and inaccurate. Knowing of the limitations imposed by law on Mushroom, petitioner cannot now seek to impose upon the carrier a heavier burden or a higher duty than the law requires.

In *Clemons Produce Co. v. Denver & Rio Grande R. R. Co.*, 203 Mo. App. 100, 219 S. W. 660, the court held that

the freezing was an act of God, for which the carrier would not be answerable and stated that even if the freezing were not regarded as an act of God, "if the loss occurs through the perishable character of the freight, unmingled with the carrier's negligence, it is not his act and he should not be held liable, though the burden would be on him to show that fact."

In *B. F. Schwartz v. Erie R. R. Co.*, 128 Ky. 22, 106 S. W. 1188, the Court said:

> "Where the injury to goods is due to their own inherent nature and from natural causes, such as freezing, without fault on the part of the carrier, he is not responsible. . . . The carrier is also not responsible for any injury which is due to the negligence of the shipper."

It was there held that the railroad company was not responsible for a shipment of apples which froze in transit.

In *White v. Minneapolis & Rainy River Ry. Co.*, 111 Minn. 167, 126 N. W. 533, it was held that a carrier does not insure perishable freight against freezing during the period ordinarily required for its transportation in the absence of a contract to that effect and that there could be no recovery for damage to vegetables frozen in transit unless the defendant failed to use reasonable care to protect the shipment while its shipment was delayed.

See also *McGovern v. Ann Arbor R. R. Co.*, 165 Wis. 525, 162 N. W. 668.

In *McGraw v. B. & O. R. R. Co.*, 18 W. Va. 361, the action was to recover the value of potatoes which were frozen in transit. The plaintiff recovered on the theory of delay in shipment but it was held that (p. 365): "if the question of liability rested simply upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct by which that injury resulted, I would have as little hesitation in saying, that they were not liable; on account of the nature and inherent character of the property and its liability to freeze."

The same rule was applied in *Vail v. Pacific R. R.*, 63 Mo. 230.

"As a general rule, a carrier as to most commodities delivered to it for transportation is an insurer against all results incident to the transportation, except injury resulting from the act of God, the public enemy, the fault of the shipper, but it is only liable for deterioration in perishable goods in case of negligence": *Tri-State Fruit Growers' Assn. v. St. Louis-San Francisco Ry. Co.*, (Mo. App.) 264 S. W. 445.

Petitioner draws a rather tenuous distinction between vegetables and fruit on the one hand and dormant rosebushes on the other, and argues that the cases holding that a carrier is not liable for the freezing of vegetables and fruits are not applicable to carriers of dormant rosebushes. We fail to perceive any reality in the distinction drawn. Fruits and vegetables can freeze. So can dormant rosebushes. Wherein lies any distinction insofar as freezing is concerned? The fallacy in petitioner's argument is in failing to distinguish between the rot and decay of vegetable and animal matter, which is an inherent vice in such goods, and the susceptibility of all vegetable matter to freezing. The incontestable fact remains that dormant rosebushes just as potatoes or apples, are susceptible to freezing. Petitioner knew this and should have taken such precaution to protect its goods adequately against freezing, either by shipping in heated railroad cars or affording proper wrapping to safeguard the contents of the boxes against the cold weather which then existed.

As stated by the Supreme Court of Pennsylvania (351 Pa. at 585, R. p. 351a): "Defendants were not insurers against loss resulting from the inherent nature of the plants".

VII. MUSHROOM WAS NOT THE DELIVERING CARRIER

The Interstate Commerce Act, 49 U. S. C. A. Sec. 20, paragraph (11) as embodied in the Federal Motor Carriers

Act of 1935, 49 U. S. C. A. Sec. 319, provides that "any common carrier . . . *delivering* said property . . . shall be liable . . . for . . . loss . . . caused by it or by any such common carrier . . . over whose lines such property may pass . . . on a through bill of lading."

This suit was brought against the defendant carriers under that section of the Act "since . . . one of the defendants is liable as delivering carrier under Section 219 of the Federal Motor Carriers Act . . .". (See conclusion of statement of claim, p. 9a.)

The evidence overwhelmingly establishes that Bickley, not Mushroom, was the delivering carrier. All the proof, both oral testimony and documentary evidence, points unerringly to the fact that Bickley was in fact and in law the delivering carrier, and is utterly inconsistent with any theory that Mushroom was the delivering carrier.

The trial judge expressly concluded that Bickley was the delivering carrier. In his adjudication he wrote (328a): "In our judgment the delivering carrier in this case was William Bickley, trading as Bickley's Auto Express. He performed the line-haul service nearest to the point of destination." He also referred to Bickley "as a delivering carrier" (329a). The Court in banc stated that Mushroom "was *not* the delivering carrier, . . ." (337a, Court's italics). Neither petitioner nor Bickley filed exceptions to these findings and conclusions.

The Supreme Court of Pennsylvania (351 Pa. at 588, R. p. 354a) said:

> "The learned judge was therefore right in holding that Bickley's Auto Express was not performing a mere switching service but was participating in the line-haul as delivering carrier: 49 USCA Section 20 (11)."

There was no attempt by petitioner or Bickley to prove that Mushroom was the delivering carrier, and there is not a scrap of evidence to support any such conclusion. Indeed, Bickley expressly admitted in paragraph 10 of his affidavit of defense that he was the delivering carrier and expressly

denied that Mushroom was the delivering carrier. The trial judge in his adjudication (311a) stated that Bickley "by an amendment made at the trial . . . denied he was the delivering carrier." This was an inadvertence on the part of the Court because the motion to amend was in fact refused (47a-49a).

It is not disputed that the originating or initial carrier was Goetzman & Newman in Newark, N. Y. Goetzman & Newman delivered the goods to Mushroom in Rochester, N. Y. The reference to Mushroom as the "delivering carrier" in the bill of lading, which was prepared by petitioner, is without significance. The reference is self-serving and inconsistent with the admitted facts as established by the evidence. It is obvious that petitioner merely assumed that Mushroom would carry the shipment to North Wales. When Goetzman & Newman delivered the goods to Mushroom, it issued to Mushroom a waybill covering the shipment which described Mushroom as "connecting line refn." (307a). Mushroom, however, did not deliver the goods to North Wales. Mushroom, in the exercise of its right under the bill of lading "to deliver to another carrier on the route to said destination" (Bill of Lading, 289a), transported the goods to its Philadelphia terminal and there turned them over to the defendant, Bickley. Bickley then delivered the goods to the consignee in North Wales under *its own* waybill, in which were set forth the name of the shipper, Jackson & Perkins; the consignee, Florex Gardens; the number of the articles; their description; their weight and the freight charge. Mushroom was referred to as the "connecting line" (15a, 291a).

The Interstate Commerce Act, 49 U. S. C. A. Sec. 20, paragraph (11), as embraced in the Federal Motor Carriers Act, 49 U. S. C. A. Sec. 319, provides that "the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination".

It is under this section that petitioner contends that Mushroom was the delivering carrier. There cannot be the slightest question concerning the fact that Bickley performed the line-haul service nearest to North Wales, the point of destination. Bickley's participation in the transportation was not limited to a "switching service at the point of destination".

This shipment was consigned from Newark, N. Y., to North Wales. Philadelphia was not the point of destination. Philadelphia does not appear anywhere on the documents. Mushroom was an intermediate, connecting carrier with the right under the bill of lading to deliver the goods to another carrier for ultimate delivery to the consignee. By no stretch of the imagination can Bickley be regarded as furnishing a "switching service" or a mere pick-up and delivery service.

Bickley delivered the goods to the consignee on its own documents. It collected the freight charge and paid Mushroom its proportionate share thereof. There was no contract or arrangement of any kind in effect between Mushroom and Bickley whereby the latter was obliged to render any service to Mushroom as agent or otherwise. Bickley owned its own equipment, paid all the expenses incident to the operation of its business and was completely independent of Mushroom in every way. The evidence affirmatively demonstrates this and there was no proof to the contrary. It is vain for petitioner to assert that Bickley was furnishing a mere pick-up and delivery service or was acting as agent for Mushroom in the face of the incontestable evidence to the contrary.

Moreover, neither petitioner nor Bickley proved or attempted to prove that North Wales was in the terminal area of Philadelphia. They could not have done so had the point occurred to them. The Philadelphia commercial zone is defined by the Interstate Commerce Commission to include an area which excludes Upper Gwynned Township, Montgomery County, in which North Wales is located: Federal Motor

Carriers Act of 1935, Sec. 203 (b) (8), 49 Stat. 546, 49 U. S. C. A., Sec. 303 (b) (8); Order ex parte No. M. C.-6, 17 M. C. C. 533 July 21, 1939; 4 Federal Register 3592; 49 Code of Federal Regulations No. 170, p. 2969; Adjudication, 328a.

See In re: *Harold Pollit Contract Carrier Application;* No. M. C. 92044, July 30, 1942; C.C.H. Federal Carriers Service, Commission Decisions, Paragraph 30,382.01; *Columbia Terminals Company Contract Carrier Application;* No. M. C. 48704, C.C.H. Federal Carriers Service, Paragraph 30,145.01-.02-.03-.04.

We submit that there is not the slightest support in the record for a finding or a conclusion that Mushroom was the delivering carrier. On the contrary, the evidence shows beyond question that Bickley's Auto Express was the delivering carrier.

The petitioner devotes less than a page of its brief to the conclusion that Mushroom was the delivering carrier. It referred only to the case of *Missouri Pacific Rwy. Co. v. Reynolds Grocery Co.*, 268 U. S. 366, in which one carrier *employed* another to perform a *switching service.* It was held that the carrier performing the switching service was not the delivering carrier. Obviously the case has no application under the facts in this case.

Bickley, in its brief filed with your Honorable Court, does not contend that Mushroom is delivering carrier and does not deny that Bickley was the delivering carrier.

The court below was entirely right in deciding that Bickley was the delivering carrier.

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of Pennsylvania is unassailable, that there is no merit in the petition for a writ of certiorari and that the petition should be denied.

Respectfully submitted,

LEMUEL B. SCHOFIELD,

W. BRADLEY WARD,

Attorneys for Mushroom Transportation Company, Inc., one of the Respondents.

AUG 20 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945 No. 214.

JACKSON & PERKINS COMPANY,
Petitioner,

v.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, Trading as BICKLEY'S AUTO EXPRESS,
Respondents.

REPLY OF WILLIAM BICKLEY, TRADING AS BICKLEY'S AUTO EXPRESS, TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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COUNTER-STATEMENT OF FACTS

The petitioner, the plaintiff in the Pennsylvania jurisdiction, brought a suit in assumpsit against the two defendants named, to recover the sum of $2539.19, the value of certain dormant rosebushes, which were shipped from Newark, N. Y., to North Wales, Pa.

In its statement of claim, the petitioner based its right to recover upon the negligence of the two defendants as follows: "By reason of the negligence of the defendants in not protecting the said goods from cold and their negligent detention and delay in the transportation of the said goods, as aforesaid, the same were on their arrival at point of

destination wholly spoiled and unfit for use, and wholly lost to the plaintiff."

In its statement of claim, the petitioner alleged that either one of the two respondents was the delivering carrier under Section 219 of the Federal Motor Carriers Act. In the trial of the case, as well as in the argument before the Supreme Court of Pennsylvania, and indeed in its argument on the Petition for Writ of Certiorari, the petitioner contended and contends that Mushroom Transportation Company, one of the respondents, was the delivering carrier.

Furthermore, in the statement of claim as filed by the respondents, it was alleged that the goods delivered to the carriers were in a class known as "perishable" and that they were so labeled.

Both of the respondents in their pleadings denied the charge of negligence. On the issue thus framed, the case was tried by a Judge without a Jury, thereby making the Trial Judge both the Court and the Jury.

The case was tried on the theory of negligence of the defendants. The plaintiff, the petitioner here, proved by witnesses that the rosebushes had been delivered to the Mushroom Transportation Company at Rochester, N. Y., and proved that they were delivered by the Mushroom Transportation Company to William Bickley in Philadelphia, who transported them to the consignee named in the bill of lading at North Wales, Pa.

The plaintiff also proved that the rosebushes as packed, would withstand temperatures as low as zero, if not exposed for any great length of time. It was also proven that at no time during the course of transportation did the temperature reach zero.

Both of the defendants offered evidence to prove that they had not been negligent in the management of the shipment or in any delays incident to the transportation.

Both of the defendants had filed tariffs which contained no provisions that their trucks or terminals would be protected by artificial heat. Both defendants assumed the burden of proving that they were not negligent.

The Trial Judge sitting as a Jury found as a fact that neither of the defendants was negligent in the handling of this shipment and found also that the shipment was of "perishable" goods and that they were damaged as a result of an inherent condition of the shipment.

The findings of fact by the Trial Judge were sustained by the Court in banc, on a motion for a new trial.

The Supreme Court of Pennsylvania in its opinion stated the law of Pennsylvania to be that the judgment was entered on the findings of the Trial Judge after they were approved by the Court in banc, and consequently had the effect of a verdict of a Jury.

SUMMARY OF ARGUMENT

(a) The decision of the Supreme Court of Pennsylvania is not contrary and in conflict with the decisions of the United States Supreme Court.

(b) The Supreme Court of Pennsylvania recognized and applied the Acts of Congress and the decisions of the United States Supreme Court applicable to the facts as presented.

(c) The Supreme Court of Pennsylvania and the Trial Court acted in consonance with the Acts of Congress and the decisions of the United States Supreme Court relative to presumptions and burdens of proof.

(d) The case involved purely an issue of fact and the rulings of the Trial Court and the opinion of the Supreme Court of Pennsylvania were in accord with the federal law.

ARGUMENT

The petitioner asks your Honorable Court to grant the writ of Certiorari to the Supreme Court of Pennsylvania first because "the Supreme Court of Pennsylvania ignored the rule that questions of the burden of proof and the quantum of proof necessary to carry that burden are matters of Federal law * * *, and failed to apply the Federal law in determining whether the respondents had exculpated themselves from liability for goods frozen while in transit."

The Supreme Court of Pennsylvania in its opinion said:

> "The transaction is governed by federal law: Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209. The plants were frozen and of no value when delivered to the consignee, facts making a prima facie case against the defendants. The defendants are liable unless the record shows they discharged their obligation to transport and deliver: 49 USCA sections 20 (11) (12)."

The petitioner has cited the case of *Garrett* v. *Moore-McCormack Company*, 317 U. S. 239, in support of its reasons for the issuance of a Certiorari. In that case your Honorable Court stated that the Supreme Court of Pennsylvania sustained the Court in banc and gave judgment n. o. v. "not on appraisal of disputed questions of fact, but because of a conclusion that petitioner had failed to sustain burden of proof required under Pennsylvania law to invalidate release." In that case the Supreme Court of Pennsylvania affirmed the judgment in the belief that the rule as to burden of proof on releases does not affect the substantive rights of the parties, but is merely procedural, and is, therefore, controlled by State law.

In the case at Bar there was no such ruling by either the lower Court or the Supreme Court. Both sides presented all of the evidence obtainable. The plaintiff endeavored to prove that the defendants had been negligent and the defendants answered by proving facts from which the Court found that they had not been negligent. The case as tried presented purely an issue of fact. The Supreme Court of Pennsyl-

vania conceded that the case was controlled by federal law, even to the extent of holding that the burden was on the defendants to exculpate themselves.

It is submitted that this Court will not grant a Certiorari in a case which depended for its ultimate decision upon an issue of fact.

In the case of *Chicago S.W.W.R. Co.* v. *Whitnack Products Co.*, 258 U.S. 369, cited by the petitioner, the suit was against the last carrier and in the discussion of the case your Honorable Court stated common law rule which permitted a "presumption" that the damage occurred on the last carrier, and while seemingly the Carmack Amendment seemed to place liability on the initial carrier, it also provided that nothing therein shall deprive any holder of a bill of lading of any remedy or right of action which he has under existing law. An examination of that case will show that even under the federal law the proof of delivery to the carrier of a cargo in good condition and a receipt by the consignee in poor condition merely raises a presumption of liability. It does not conclusively establish liability of the carrier. The carrier then has the right to offer evidence to rebut such presumption. That is exactly what occurred in this case. The plaintiff was given fully all of its rights under the federal law and there was nothing in the opinion of the lower Court or of the Supreme Court which deprived the plaintiff of any of its substantive rights under the federal law.

The second reason assigned by the petitioners for the writ of Certiorari was that the Supreme Court of Pennsylvania failed to apply the federal rule which requires that after the shipper has proved that the goods left the shipper's control in good condition and arrived in a damaged condition, the carrier must prove that the loss was caused solely and entirely by an excepted peril:—either Act of God, * * * or inherent nature of the goods. It is submitted that the Trial Court was sustained by the Court in banc and the Supreme Court adhered strictly to that federal rule, but found as a fact that the goods arrived in a damaged condi-

tion because of "the inherent nature of the goods." What the inherent nature of the goods was undoubtedly constituted a question of fact and the finding of the Trial Judge that the damage was the result of the inherent nature of the goods was sustained by the Court in banc and, therefore, the Supreme Court again held that such a finding sustained by the Court in banc had the effect of a verdict of a Jury.

At Page 314a of the transcript will be found a statement by the Trial Judge in his Adjudication, stating the common law liability of the carrier. It goes on to state:

> "Inasmuch as this was a shipment in interstate commerce, the federal law controls."

Quoting from *Chesapeake & Ohio Ry. Co.* v. *Thompson Manufacturing Co.*, 270 U.S. 416, said:

> "The federal rule is that 'a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes.'"

On Page 329a of the transcript, the Trial Judge in his Adjudication said:

> "From the competent and credible evidence adduced by the defendants, together with the evidence adduced by the plaintiff, we find that the loss in this case was not caused by the failure of defendants to properly perform their duties as common carriers, * * * but was caused by the inherent nature of the goods shipped and natural causes."

In answering the third reason assigned by petitioner it is suggested that as stated it probably is true, but unfortunately the record establishes beyond any question that the Courts of Pennsylvania and especially the Trial Court, specifically applied the federal law respecting the burden of proof.

In answer to the fourth reason it is suggested that the Trial Judge whose findings were sustained by the Court in banc, found as a fact that the goods while in transit were

frozen solely because of prevailing temperatures and that the damage was due to the inherent nature of the shipment and that the defendants had sustained the burden of proof placed upon them by the federal law.

To return this case to the Pennsylvania jurisdiction could only mean a retrial of the same factual issues with the same instructions of law. It would merely amount to giving the petitioner another chance to try its case.

In Paragraph 5 the petitioner again overlooks the record in this case. The Supreme Court of Pennsylvania did not hold that the test of the carrier's liability "is not whether it performs its contract of carriage without negligence but rather, whether it brings itself within the five exceptions to a carrier's liability."

As hereinbefore stated, the Trial Judge in his Adjudication discusses every feature of the case complained about in this petition for a writ of Certiorari. He discusses the question of burden of proof; he discusses the five exceptions referred to in petitioner's petition for a writ of Certiorari, and he found as a fact that the defendants had brought themselves within the five exceptions, and also found as a fact that the goods shipped were "perishable"; and the Supreme Court also held that the burden was on the defendants even though they had brought themselves within one of the five exceptions to prove that they had not been negligent.

Whether or not your Honorable Court would have found in the same way as did the Trial Judge is not the question to be decided, nor is it controlling. The question is, was there any evidence to justify any such finding of fact and it is submitted that there is ample to justify such finding.

It is respectfully submitted that the reasons assigned by the petitioner as the basis for the issuing of the writ of Certiorari cannot be supported by the record in this case. Everything which the petitioner contends was not done by the Supreme Court of Pennsylvania was actually done by the Supreme Court of Pennsylvania.

It is true that in the opinion of the Supreme Court of Pennsylvania the Court stated:

> "We need not discuss plaintiff's argument on the burden of proof; the evidence is in the record; the only question now is whether the law was correctly applied to the evidence. If, on the evidence, a Jury could not find for the defendants, the judgment must be set aside."

In other words the Supreme Court found in effect there was no need to consider the argument on burden of proof because the record disclosed that both sides had tried the case in the light of the federal rule regulating burden of proof.

It is respectfully submitted that the petitioner in the trial of this case and in the argument before the Supreme Court of Pennsylvania endeavored to reverse its own pleadings because in its statement of claim it alleged the goods were perishable; and that the goods were marked perishable; but in the trial of the case and in the argument before the Supreme Court, the petitioner endeavored to withdraw that allegation and argument and contend that the bushes were perishable.

Taking into consideration that these dormant budding rosebushes were wrapped in moss which had been wet for the purpose of keeping alive the roots, and that these rosebushes so wrapped with wet moss were shipped in January during a period of time when the temperature was much below freezing, the only possible result could be that unless carried in heated trucks the moss itself would freeze and consequently freeze the roots of the bushes. This shipment in temperatures below freezing was a shipment of perishable goods. When they were delivered to the plaintiff from California they were kept by the plaintiff in a room with a temperature of about thirty-three degrees and from that temperature they were placed in trucks unheated and operating in weather below freezing (Transcript 79a).

This defendant contends that the rule contended for by the petitioner is confined to ordinary merchandise and has

no application to perishable goods: *Jackson Company* v. *Pennsylvania Railroad Co.*, 112 Pa. Superior Court Reports 535.

This respondent further contends: The *Carmack Amendment to Interstate Com. Act* (49 USCA Section 20) has not increased the common law liability imposed on common carriers: 10 C.J. 132, Section 165. This is strongly emphasized in the case of *Adams Express Co.* v. *Croninger*, 226 U.S. 491, where it was said:

> "What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage, or injury to such property caused by it', or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for uncontrollable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage', would be to ignore the qualifying words, 'caused by it'. The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered'; and plainly implies a liability for some default in its common-law duty as a common carrier".

It is, therefore, respectfully submitted that the petition for writ of Certiorari should be dismissed.

All of which is

Respectfully submitted,

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